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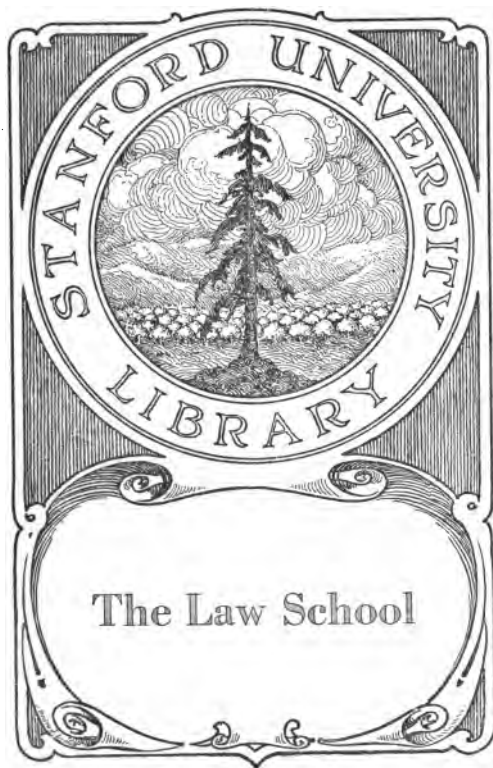
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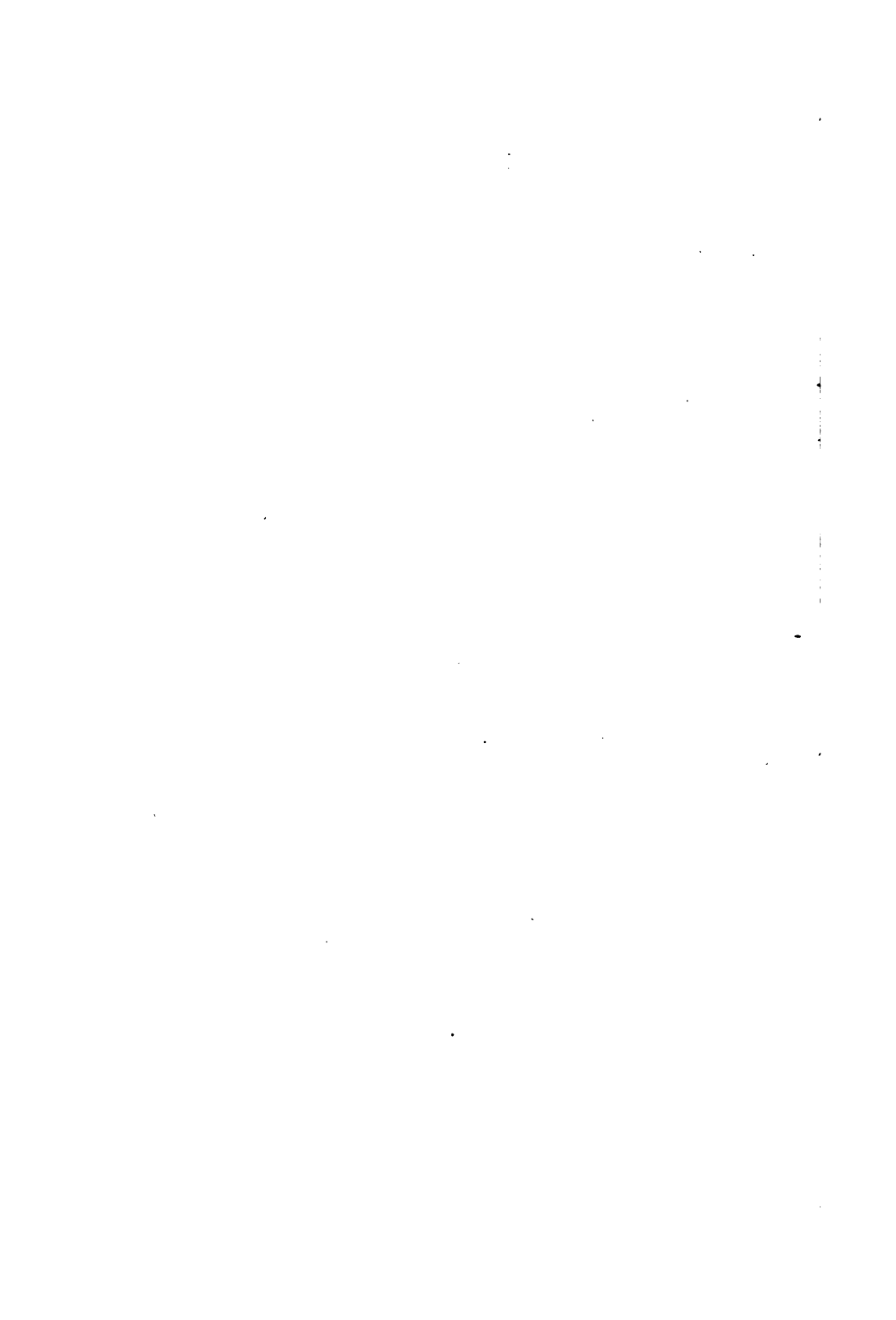
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THE
LAW OF PLEADING
UNDER
THE CODES OF CIVIL PROCEDURE.

WITH
AN INTRODUCTION BRIEFLY EXPLAINING THE COMMON
LAW AND EQUITY SYSTEMS OF PLEADING,
AND
AN ANALYTICAL INDEX, IN WHICH IS GIVEN THE CODE
PROVISIONS AS TO PLEADING IN EACH OF THE
STATES WHICH HAVE ADOPTED THE
REFORMED PROCEDURE.

BY
EDWIN E. BRYANT,
DEAN OF LAW FACULTY, UNIVERSITY OF WISCONSIN.

SECOND EDITION.

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PREFACE TO SECOND EDITION.

THIS book, originally written in 1898, has been carefully revised for this edition. Though not materially altered in structure or increased in bulk, some crudities and obscurities, as well as a few slight inaccuracies, have been removed; and the citations have been considerably enriched by later aptly illustrative cases.

The writer has used the book in class work since its publication, and experience has led him to the conclusion that for an introduction to the study of Code Pleading its plan and method were rightly conceived. But the many words of commendation from other writers on the same subject, from instructors, and even from lawyers in actual practice, afford more disinterested evidence of its worth and justification for this edition.

E. E. B.

MADISON, WIS., October, 1899.

PREFACE.

THIS book is intended rather as introductory to, than a substitute for, the more elaborate and exhaustive treatises on the Law of Pleading. The experience of instructors in law schools leads them very generally, it is believed, to prefer, as a first book to place in the hands of students, one that gives a clear but condensed statement of the general principles of the given subject. With such a general outline of the field, the student is less likely to be confused when he enters upon particulars in case-study or in those books for lawyers' use which multiply instances where general rules are qualified by exceptions, or applied in complicated cases. In preparing this work, limited space has compelled brevity and much condensation; but there has been endeavor to avoid the accompanying danger of obscurity.

No special originality of treatment has been attempted. The statement of the common-law rules of pleading is merely a condensed summary of those rules as given in Stephens' admirable treatise. The skeleton of the equity system of pleading, also given in the introductory chapter, follows the arrangement of Lord Redesdale and Story. In the presentment of the Code system many suggestions are gathered from

Pomeroy, Bliss, Maxwell, and other writers. What can fairly be claimed as a novelty in this work is — to borrow the language of the application for letters granting a patent-right — the combination of a condensed summary of the common-law rules of pleading, an outline of the equity system of pleading, a general statement of the code system as now established by statute and interpretation, and an analytical index of the code provisions relating to pleading in the twenty-seven code States and Territories; the latter compiled in such form that the features common to all can be seen at a glance, and the minor differences readily contrasted. The “Code References,” as this index is called, will enable those studying the reformed procedure with a view to practice in any State where it has been applied to note the peculiarities of its code on the subject here treated.

No effort has been made to be exhaustive in citation of authorities; but pertinent cases are cited in sufficient number to illustrate the rules given in the text; and they are gleaned from all the code States.

If the design of the author has been accomplished, the student will find in these pages much assistance in his earlier studies of the science of code pleading.

E. E. B.

MADISON, WIS., March, 1891.

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THE LAW OF PLEADING.

INTRODUCTORY CHAPTER.

SECTION I.

OF COURTS OF LAW AND ACTIONS THEREIN.

1. **Substantive and Adjective Law.** — The body of law in a State consists of two parts, *substantive* and *adjective* law. The former prescribes those rules of civil conduct which declare the rights and duties of all who are subject to the law. The latter relates to the remedial agencies and procedure by which rights are maintained, their invasion redressed, and the methods by which such results are accomplished in judicial tribunals. The rights and duties which the substantive law declares are also designated *primary* rights. Those which arise when *primary rights* are invaded are *remedial* or *secondary rights*. To enforce them the law provides for the establishment of courts, clothes them with jurisdiction, and prescribes a procedure or orderly course of business in them. The law of procedure includes whatever is embraced in the technical terms "practice," "pleading," and "evidence." Only the law of pleading is considered at length in this treatise. A few general explanations are given by way of preface in this chapter.

2. **Legal and Equitable Rights defined.** — From the peculiar manner in which English jurisprudence arose (to

be explained later on) there are, in English and American law, two classes of rights, with the appropriate remedies for their invasion. One class are called *legal* rights, because they are cognizable by courts of law. The other class are termed *equitable* rights, because they are protected, and their violation redressed or prevented, only in courts of equity.

3. The Courts of Common Law and their Jurisdiction.

There were for many centuries prior to 1875 (when a change was made by Act of Parliament) three Superior Courts of the common law in England, viz. : King's Bench, the Common Pleas, and the Exchequer. As originally established, the jurisdiction of King's Bench extended to crimes, and matters directly concerning the crown, except matters of revenue. The Common Pleas had cognizance of civil actions between subject and subject. The Exchequer, originally established as a board to look after the revenues, came afterward to exercise judicial power in matters relating to the royal revenues. In process of time, as the Common Pleas was overrun with suitors, the other courts having far less business, the convenience of justice led to usurpations by the other courts on the jurisdiction of the Common Pleas. This was accomplished by resort to fictions, and finally resulted in the Court of King's Bench and Exchequer having, in addition to their original jurisdiction, cognizance of all *personal* actions, but not of *real* or *mixed* actions.

4. *Actions and Suits defined.*—An action, in the sense of a legal proceeding, is defined by Lord Coke to be “the form of a suit given by law for the recovery of that which is one's due; the lawful demand of one's right.”¹ The action includes the whole course of proceedings to obtain

¹ Co. Litt. 284 b, 285 a.

redress for a civil injury. The terms "action" and "suit" are nearly if not quite synonymous.¹ But lawyers usually speak of proceedings in courts of law as "actions," and of those in courts of equity as "suits." In olden time there was a more marked distinction, for an action was considered as terminating when judgment was rendered, the execution forming no part of it. A suit, on the other hand, included the execution.² The word "suit," as used in the Judiciary Act of 1784 and later Federal statutes, applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him.³ "Proceeding" is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied.⁴ It is more comprehensive than the word "action," but it may include in its general sense all the steps taken or measures adopted in the prosecution or defence of an action,⁵ including the pleadings⁶ and judgment.⁷ As applied to actions, the term "proceeding" may include — (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of *ne exeat*; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgment; (9) the execution; (10) proceedings supplementary to execution, in code practice; (11) the taking of the appeal or writ of error; (12) the *remittitur*, or sending back of the record

¹ 3 Blackst. Com. 116.

² Co. Litt. 289 a, 291 a; Un. Bank v. Geary, 5 Pet. 99.

³ Weston v. Charleston, 2 Pet. 449, 464.

⁴ Bulkeley v. Keteltas, 3 Sandf. (N. Y.) 741; Rich v. Hunson, 1 Duer (N. Y.), 620.

⁵ Morehead v. Hollister, 6 N. Y. 309.

⁶ Jackson v. Hoaglin, 5 Kan. 559.

⁷ Yeager v. Wright, 112 Ind. 230, 235.

to the lower court from the appellate or reviewing court; (18) the enforcement of the judgment, or a new trial, as may be directed by the court of last resort.

The codes of procedure in the several States which have departed from the common-law practice define an action to be "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence."¹ Every other remedy is a "special proceeding."²

5. The Common-law Actions.—The actions which could be brought and prosecuted in the courts of common law were divided, somewhat arbitrarily, into three kinds, *real*, *personal*, and *mixed*. *Real actions* were brought to recover lands, tenements, or hereditaments. They were of two classes, *petitory* and *possessory*. In *petitory* actions the controversy was concerning the property and right. In *possessory* actions the dispute was in relation only to the possession. The petitory real actions consisted of the *writ of formedon*, classified thus: (1) In the *descender*, when brought by the heir in tail for lands of which the tenant in tail was disseised and then died; (2) In the *remainder*, when brought by a remainder-man in tail, when a stranger intruded and kept him out of possession after the expiration of the particular estate; (3) In the *reverter*, when the donee in tail or his heirs had died without issue and the reversion fell in upon the donor, his heirs, or assigns.³ There was also the *writ quod se deforciat* for owners of life estates, and the *writ of right* to recover the fee. The possessory actions were (1) the writ of entry, (2) the writ of assize, of two forms, viz.: assize *mort d'ancestor*, which lay when the person entitled to

¹ Code Ref. 6.

² 3 Blackst. Com. 192.

³ Code Ref. 4.

the land on the death of his ancestor had been deprived of it by the abatement or intrusion of a stranger,¹ and assize of *novel disseisin*, where the claimant had been lately disseised.² In course of time these actions, being very technical and encumbered by dilatory proceedings, passed out of use, and were superseded by the more practical action of *ejectment*. Hence no time need be devoted to them by the student.

Personal actions are those brought (1) for specific recovery of goods or chattels, (2) or for damages or other redress for breach of contract, (3) or every other kind of injury.³ They are *ex contractu* when they arise out of contract, *ex delicto* when they arise out of the wrong or delict of the defendant.

Actions ex contractu were somewhat illogically classified thus: *covenant*, *debt*, *assumpsit*, *detinue*, and *account*.⁴ The *action of covenant* lay where the party claimed damages for a breach of contract or promise under seal. The *writ of debt* lay for the recovery of a debt; that is, a liquidated or certain sum of money alleged to be due from defendant to plaintiff. The *writ of detinue* was the ancient remedy where the plaintiff claimed the specific recovery of goods, chattels, deeds, or writings detained from him. This remedy fell into disuse by reason of the unsatisfactory mode of trial of "wager of law," which the defendant could claim; and recourse was had to the action of replevin. In the American States an action of replevin founded upon statute provisions is almost universally the remedy for the recovery of specific personal property.

The actions *ex delicto* were originally the action of *trespass* and the action of *replevin*.

¹ 3 Blackst. Com. 185; Co. Litt. 159 a.

² 3 Blackst. Com. 185.

³ Steph. on Pl., Tyler's ed. 39.

⁴ 1 Chitt. Pl. 97.

Trespass is the action, in common-law classification, where a party claims damages for a trespass committed upon him. A trespass is defined to be an injury committed with violence, actual or implied; and the law implies violence though none be actually used, where the injury is of a direct, immediate kind, and is committed on the person or tangible and corporeal property of the plaintiff.

The actions of trespass which were most common were— (1) trespass *vi et armis* to the person of the plaintiff, such as illegal assault, battery, wounding or imprisonment, when not under color of legal process, or when the battery, imprisonment, etc., were in the first instance lawful, but by unnecessary violence used, or by imprisonment continued after the process had determined, had ceased to be lawful; this action also lay for injury to relative rights, such as menacing tenants, servants, etc., beating and wounding a wife, criminal conversation with or seducing a wife, or debauching a daughter or servant;¹ (2) trespass to personal property, a concurrent remedy with trover for illegal takings, and generally called trespass *de bonis asportatis* (for carrying away goods);² (3) trespass to real property, or trespass *quare clausum fregit* (wherefore he broke the close), where there had been an unlawful invasion of real property in possession of the plaintiff.

The Statute of Westminster 2.— But quite early it was found that the writs or actions devised for the law courts were not comprehensive enough to embrace the wrongs to person or property, which one could commit upon another. A great number of delicts were without common-law remedy. To supply this defect the statute of Westminster 2 (A. D. 1288) made provision for the

¹ Chitt. Pl. 167.

² Chitt. Pl. 180, 191.

framing of other writs.¹ The statute quoted below led to the devising of several new writs, which have long served a useful purpose in remedial justice.

Trespass on the Case generally. — The most important of the writs framed under the authority of the statute of Westminster 2 is that of "trespass on the case," to meet cases analogous to trespass in delict, but lacking the element of direct or immediate force or violence. This writ gave a form of action in which the court was enabled to render judgment of damages in cases of fraud, deceit, negligence, want of skill, defamation oral or written, and all other injurious acts or omissions resulting in harm to person or property, but wanting the *vi et armis*, the element of direct force and violence, to constitute trespass.

Trover. — Afterwards, in the progress of the law, was invented a second action, of the class of trespass on the case, to afford remedy for a peculiar wrong of frequent occurrence, viz. : that of the unlawful detention of goods and chattels from the owner, and their conversion by the wrong-doer to his own use. This action was called "trover," from the French word *trouver*, to find, and was founded on the fiction that the plaintiff had *lost* the chattels, and that the defendant had *found* them and then unlawfully converted them. The fiction of loss and finding was alleged in the declaration; but no issue could be joined on this allegation, the essential facts being the

¹ The statute reads, Cap. 24: "And whensoever from henceforth it shall fortune in the Chancery that in one case a writ is found, and in like case (*consimili casu*) falling under like law and requiring like remedy, is found none, the clerks of the Chancery shall agree in making the writ; or the plaintiffs may adjourn it until the next Parliament and let the cases be written in which they cannot agree, and let them refer themselves until the next Parliament, by the consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice to complainants."

plaintiff's property or right in the goods and the defendant's unlawful conversion of them.

The action of trover, when established, became common, and in many cases was used as a substitute for debt and detainue, in both of which the right of the defendant to trial by "wager of law" made the plaintiff's remedy precarious. Lord Mansfield thus defines the action: "In *form* it (*i. e.*, the trover) is a fiction; in *substance* it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes that the defendant might have come lawfully by the chattels, and if he did not, yet by bringing this action the plaintiff waives the trespass; no damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *maleficium*; and to entitle the plaintiff to recover, two things are necessary: 1st, property in the plaintiff; 2d, a wrongful conversion by the defendant."¹

Replevin. — This ancient action is ascribed to Glanvil, Chief-Justice to Henry II., A. D. 1180. It signifies a redelivery of a thing to the owner, upon pledges of security. It was originally the exclusive remedy in cases of a wrongful distress, its object being to prevent the beasts of the plough, cattle, and other goods of the tenant in arrears of rent, from being unjustly or excessively distrained by the landlord. By the common law a distress was considered merely as a pledge or security for the rent, for service due, or for damages feasant. There were two ways in which the things distrained could be replevied, — one according to the common law, the other by a statute (52 Hen. III. c. 21). The common-law method was by a writ issued out of Chancery. The statute method was more expeditious and convenient. Without suing out a writ, the sheriff, or one of the deputies, of whom he must have four conveniently located in each county, must replevy the

¹ Cooper v. Chitty, 1 Burr, 31; Chitt. Pl. 164.

goods. But the owner must give security, — (1) pledges to prosecute (*plegios prosequendo*); (2) pledges to return the chattels if the right went against him on the trial. These pledges at first were discretionary with the sheriff; and in addition to them the statute of 2 Geo. II. c. 19, required that the sheriff granting replevin on distress for rent should take a bond with two sureties in double the value of the goods distrained, conditioned to prosecute the suit with effect, without delay, and to return the goods if return be adjudged.¹

Trespass on the Case in Assumpsit. — In early times, prior to the reign of Henry VII., there was no remedy in courts of law for the breaches of such contracts as could not be sued upon in debt or covenant. If the damages resulting from the breach were not liquidated and certain, the writ of debt did not apply. If the contract was not under seal, covenant was not the appropriate writ. Efforts were made to bring such cases within the range of the action on the case; but in 2 Hen. IV., and again in 11 Hen. IV., the judges stoutly held that breaches of such contracts were *non-feasances*, not *misfeasances*, and that case would not lie. But in 21 Hen. VII., the court were unanimous that an action on the case would lie, as well for non-feasance as misfeasance.² Thus was established a common-law remedy of great efficacy. It could be brought upon a promise, express or implied. It was so broad that it embraced actions which could be brought in debt.³ It

¹ In American practice the action of replevin is almost universally a statute remedy. But it usually contains the following features of the English statutes upon which it is founded: (1) A replevying or taking of the goods by the sheriff without a writ; (2) The requirement of a bond or undertaking (a) in double value, (b) conditioned for prosecuting with effect the action, (c) and for a return of the property if a return be adjudged. Such is the code procedure. In some States the writ or warrant of replevin is issued.

² Reeves' Hist. Eng. Law, iii. 243.

³ Slade's Case, 4 Co. 91.

was early known as "trespass on the case upon promises," but in time came to be designated *assumpsit* (he assumed or promised), and lies for damages for breach of all contracts, parol or simple, whether written or verbal, express or implied.¹

Account. — The writ of *account* or *account* was in very early times a common-law action. The statute of Marlbridge (A. D. 1267), gave it increased efficacy by giving the plaintiff arrest of defendants who were bailiffs. The statute of Westminster 2 extended the same provision for arrest of the person of servants, bailiffs, chamberlains, and all manner of receivers who are bound *ad compotem reddendum* (to render accounts).² The action of account proceeded in the courts of law in one of two ways: the defendant was brought to account before the plaintiff or before auditors assigned by the plaintiff; or he was brought by writ of account into court to make his account there. It was the common remedy in mercantile transactions, and in all cases where there were dealings and an unliquidated demand. But the action was always narrow in its operation, lying only where there was privity in deed, as against a bailiff or receiver appointed by the party, or privity in law, as against a guardian in socage, etc.³ The action of account, or account render, fell into disuse, because there grew up a jurisdiction in equity to compel accounting where there were mutual accounts, or where the account was all on one side, and there were circumstances of complication or difficulties in the way of adequate relief at law.⁴

Mixed Actions. — In early times the only mixed actions were those for the partition of lands, for which a writ was

¹ Chitt. Pl. 99.

² These statutes are the foundation of modern statutes authorizing arrest in civil actions of those who are guilty of misapplication or default when serving in a fiduciary capacity.

³ Co. Litt. 90 b.

⁴ Pom. Eq. Jur. § 1421.

provided in the common-law courts.¹ The remedy was further enlarged by the statute of 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, which gave compulsory partition, by writ at common law. These statutes formed the basis of partition in the American States; but in England and here courts of Chancery have been found most convenient, and their procedure most favorable for the division of estates in land.² The statutes at the present time, in most of the States, prescribe a procedure which is quite similar to that in equity practice.

Ejectment. — The action of ejectment is a mixed action, and has a history of peculiar interest in illustrating the growth of remedial law. Originally, a writ of *ejectione firmæ*, of the nature of a writ in trespass, lay where the plaintiff, to whom lands had been let for a term of years, had been ejected or ousted from his term. The action was simply for damages for the trespass. It was long supposed that, as the action was in the nature of trespass, the unexpired term could not be recovered any more than recovery could be had for a trespass not yet committed, and that the tenant's only remedy was against his lessor for breach of covenant of quiet enjoyment. But it was said in 21 Edw. IV. that the term could be recovered where it had not expired. This was solemnly adjudged in 14 Hen. VII.³ The decision pointed out to the lawyers that the action of *ejectione firmæ* could be made efficacious to try titles to land much more expeditiously and completely than by the real actions, which were then so loaded with technicalities as to be tedious and doubtful remedies. The method devised was this: As a term must be created in order to be recovered, the person claiming title would enter upon the land, usually unknown

¹ Bracton, 71 b-77 b.

² Story's Eq. Jur. § 647.

³ Jenk. Cent. 67; Reeves' Hist. Eng. Law, iv. 238.

to the actual tenant in possession, and there seal a lease to some person as tenant for a term of years ; for instance, to A. The lessee A would, for the purpose of the action, suppose the title of possession to be in himself, and would then serve the writ of trespass and ejectment (*ejectione firmæ*) upon the tenant in actual possession. Upon the trial, the plaintiff A must show four points, viz. : title, lease, entry, and ouster. He produced the title of his lessor. The defendant produced the title under which he claimed, and the right was then completely examined.

Finally, to avoid the trouble of making the lease, a new and simpler method, resting upon a " string of fictions," was invented in the reign of Charles II. by Chief-Justice Rolle, which applied in all cases where the lands were actually occupied by a tenant. This method dispensed with actual lease and entry, and no ouster took place. The plaintiff, a real person, stated in his declaration that a lease had been made to him by the one who claims title, and that William Stiles, the defendant, who is called the "casual ejector," ousted him, wherefore he brings suit. The casual ejector, a fictitious person, then, by the plaintiff's attorneys, sends a written notice, with a copy of the declaration against him, to the tenant in possession, assuring him that he, Stiles, has no title, and makes no claim to the lands and shall make no defence; that he advises him, the tenant, to appear in court and defend his own title, otherwise judgment will be suffered and he be turned out of possession. On receipt of this, the tenant in possession must appear, or be supposed to have no right at all. On his appearance a rule is entered making the tenant in possession the defendant in the action, and that the plaintiff's lessor pay the costs, if the plaintiff's action fail. The court then examines the title, and gives judgment for the plaintiff if he establishes the better right. In the United States the proceedings in ejectment are generally

of a more simple character, even where the common-law system of practice and pleading is maintained.

Waste. — The old action of waste was a mixed action, being founded in part on the statute of Gloucester (A. D. 1278), which provided that "he which shall be attainted of waste shall lose the thing wasted, and moreover shall recompense thrice as much as the waste shall be taxed at." The action was to recover the land in which waste had been done and the treble damages. The statute of Gloucester was imported into this country, but many variant statutes now regulate the subject.¹

Of the common-law writs and actions devised from time to time, it is said that there were fifty-nine, many of them for centuries obsolete. Only ten of them — those given in the foregoing summary — are usual in this country.

SECTION II.

OF PLEADINGS IN COMMON-LAW COURTS.

6. Pleading. — The rules of law which regulate the statement of the plaintiff's cause of action and the grounds of defence thereto are comprehended under the term "pleading." When an action or suit is brought, the plaintiff must make known in an intelligible manner the grounds of his complaint, the facts showing that some right of his has been invaded by the defendant. This information is essential for three reasons: (1) To inform the court of the nature of the plaintiff's complaint and demand for remedy; (2) To advise the defendant of the charge made against him, so that he may defend it; (3) That the adjudication had upon the hearing of the case

¹ See 4 Kent Com. 80; 1 Wash. Real Prop. 5th ed. 158.

may be a finality, and the same facts not be again brought forward as the basis of another action, or the subject of future controversy. The defendant on his part must also make known the grounds on which he resists the plaintiff's demand. In order that these allegations on each side may be so conducted as to produce an issue,—some matter alleged by one party and controverted by the other,—rules of statement are necessary to secure materiality, certainty, clearness, directness, and brevity in the assertions of the parties. In the different systems of jurisprudence—common law, equity, and the civil law—such rules have been established; and in each the science of pleading, the knowledge of these rules, is an important part of the law.

Prior to the adoption of the codes of procedure, or practice acts, there were in English and American jurisprudence three different systems or types of pleading, each governed by its own rules. They were—(1) the common-law pleadings, (2) equity pleadings, (3) pleadings “by allegation,” or the method usual in courts of admiralty and ecclesiastical courts, and in those tribunals whose system was borrowed from, or based upon, the civil law. To properly understand the code system, a summary of the modes and rules of pleading which it has superseded seems here to be necessary.

7. Common-law Pleadings.—In the common-law courts of England a very elaborate and complete system of rules of pleading grew up and obtained for several centuries. It came to this country as part of the common law, our British ancestors here adopting it as part of “the birth-right of Englishmen.” In this system the pleadings were the following:—

The Count, Declaratio or Declaration.—This was the first pleading on the part of the plaintiff, in which he set

forth his grievance, as one falling within some one of the actions of which the courts of common law could take cognizance. The declaration began with a recital of the writ thus : "CD [the defendant] was summoned [or attached] to answer AB [the plaintiff] of a plea that" (here was stated briefly the nature of the plea or action, whether it was trespass or covenant, etc.). Then followed the allegation of the cause of action, thus : "And there-upon the said AB, by —, his attorney, complains and says : For that, heretofore to wit." (Here the cause of action was stated, in which the facts showing the violation of the plaintiff's right were narrated.) The declaration then concluded with "laying damages and production of suit," which was this formula of words : "To the damage of the plaintiff [a sum stated] ; and therefore he brings his suit."

The Demurrer. — The defendant, in response to the declaration, must either demur or plead. If he conceived that the declaration was "insufficient in law," — that is, that it did not properly and in proper form state a cause of action on which, conceding it to be true, the plaintiff was entitled to a judgment, — the defendant would demur. The word "demurrer," derived from the Latin *demorari*, or the French *demorrer*, meaning to "wait or stay," imports that the party demurring waits or stays in his proceedings in the action until the judgment of the court is given whether he is bound to answer to so insufficient a pleading. Each party may demur to what he deems an insufficient pleading of the other. The demurrer was *general* when it was to matter of substance ; it was *special* when it was made to matter of form, and must specifically point out the defect.

The Plea. — If the defendant did not demur to the declaration, he must plead ; that is, he must answer the facts alleged in it. His plea might be either by way of

traverse or by way of confession and avoidance. By the traverse he denied all or some of the material allegations of the declaration. But he might either expressly or tacitly, by not denying, admit the allegations to be true, and set forth other matters which had the effect to destroy or defeat the plaintiff's cause of action. This was called matter in "confession and avoidance."

Pleas were *dilatory* or *peremptory*. The dilatory class were — (a) to the jurisdiction, (b) in suspension of the writ, (c) in abatement of the writ. If successful, they defeated the particular action, but not the plaintiff's right of action. The peremptory pleas were in bar of the action, and if successful, barred or defeated the right of action.

The Replication. — The plaintiff must reply to the defendant's plea. If the plea was a traverse or mere denial tendering an issue of fact and in proper form, the plaintiff must accept the issue. If the plea contained new matter in confession and avoidance, the plaintiff might reply, traversing the new matter in the plea, or setting up other matter that destroyed its effect as a defence. The pleading in which the plaintiff made reply was called *the replication*.

The Rejoinder. — To the new matter alleged in the replication the defendant might wish to respond, either by traverse or other matter by way of confession and avoidance. To do so he interposed a fourth pleading in the series, called a rejoinder, in which he denied or avoided the allegations of the replication; and this pleading was called *the rejoinder*.

The Surrejoinder. — The pleading by which the plaintiff met the rejoinder, whether by traverse or by other matter in confession and avoidance, was called *the surrejoinder*.

The Rebutter. — The defendant's pleading in retort to the surrejoinder was called *the rebutter*.

The Surrebutter. — The seventh pleading in the series was the surrebutter, or the plaintiff's answer to the matter in the rebutter.

While it was possible for the pleadings to extend farther than those above named, it was very rare in practice that they extended so far, as the parties were likely to arrive at an issue, which terminated the series of pleadings, in the replication or the rejoinder.

8. The Rules of Common-law Pleading. — These were treated of in several classes, as follows: rules which tend—(1) to produce an issue; (2) to secure materiality of the issue; (3) to produce singleness or unity of the issue; (4) to produce certainty or particularity of the issue; (5) to prevent obscurity and confusion in pleading; (6) to prevent prolixity and delay; (7) miscellaneous rules as to form, order, and structure of the pleadings. These rules were the following: —

9. Rules to produce an Issue: Rule I. *After the declaration, the parties must, at each stage, demur or plead, by way of traverse, or by way of confession and avoidance.* — If the pleading amounted to neither of these modes, it was demurrable. The demurrer to the declaration (or to any pleading in the series) was either general or special, — general when it challenged the sufficiency of the declaration in substance; special, when the objection was to mere matter of form. By statute,¹ it was required that the demurrer must specially set down the imperfection, defect, omission, or want of form relied on as ground of objection. But having demurred specially, the demurrant might on the argument take advantage of faults of substance as well.²

¹ 27 Eliz. c. 5; 4 Anne, c. 16.

² 1 Chitty, 642, 1st ed. Bac. Abr. *Pleas*, etc., No. 5.

The effect of a demurrer was — (1) to admit all such matters as were sufficiently pleaded; (2) “to reach back to the first fault,” or more accurately speaking, to open the whole record to the court, which would give judgment to the party who, on the whole series of pleadings antecedent to the demurrer, would appear to be entitled to it. Thus, if the plaintiff demurred to the plea, the court might find the declaration bad in substance and give judgment to the defendant; but this effect did not follow demurrer to a plea in abatement, nor to demurrer for mere defects of form.

Traverses were of various kinds: (1) The *common traverse*. This was a denial by way of express contradiction, in terms, of the allegation traversed and a tender of issue. It was negative when contradicting affirmative allegations, but affirmative when denying negative allegations. (2) The *general issue* was a frequent form of traverse. In covenant, or debt on a specialty, or sealed instrument, the general issue was *non est factum*, or, in English, that the instrument sued on “is not his deed.” In detinue the general issue was *non detinet* (he does not detain). In trespass and trespass on the case this issue was “not guilty.” Of the effect of the general issue and its nature more will be explained hereafter. (3) Another form of traverse sometimes occurred in the replication in actions of trespass, called the traverse *de injuria absque tali causa*, which seems to have been invented to economize in words. When the plea consisted of matter of excuse only, the plaintiff, instead of contradicting in detail the allegations, merely alleged that the defendant had done the act “of his own wrong and without the cause in his plea alleged.” Another traverse was *the special*, quite common in the technical age of practice, but long since fallen into disuse. It consisted of matter of inducement alleged in such manner as to amount to an

argumentative denial. This was followed by an *abesque hoc* (*without this, that*), and this was a denial in effect of some part of the preceding pleading; the whole concluded with a verification or offer of proof.¹ This pleading was of subtle texture, and long the delight of the acute lawyers of a technical class.

The sub-rules relating to traverses were: (1) That the traverse must deny the allegations "in the manner and form" in which they were made, though this rule was not strictly enforced; (2) That a traverse was not to be taken upon matter of law, for that was the province of a demurrer; (3) That a traverse must not be taken on matter not alleged, though it might be taken on matter not expressly alleged, but necessarily implied; (4) That a party to a deed, who traversed it, must do so by the general issue *non est factum*, and not by the words of contradiction, that he "did not grant," or "did not demise," etc.

The pleading in confession and avoidance, as it did not tender issue, must always *conclude with a verification and prayer for judgment*. This was a formal requirement, and the formula was: "And this [the defendant] is ready to verify; and he prays judgment if the said plaintiff ought to have and maintain his aforesaid action against him, the defendant." Another sub-rule was that every pleading by way of confession and avoidance *must give color*. In other words, it must admit an apparent right in the opposite party, and rely on some new matter to defeat it. The giving color, when express, was an allegation of some fictitious, apparent right in the opposite party, which, however, never must consist of such matter as, if it were effectual, would maintain the nature of the action. It could only be colorable, not real, actual right. The object of giving color was to enable the pleader to set up new matter in the way of confession and avoidance, which

¹ Steph. on Pl., Tyler's ed. 181.

but for the color given of a right in the other party would be provable under the general issue. This subtle device of ancient rhetoricians is of little use in modern pleading.

Pleas by way of confession and avoidance were (in reference to their subject-matter) either (1) in *justification* or *excuse*, or (2) in *discharge*. The former showed some justification or excuse for the act complained of, and, therefore, that the plaintiff never had a right of action; the latter, though conceding that the plaintiff once had a right of action, showed that it had been released, extinguished, or discharged by some subsequent matter, such as a release, accord and satisfaction, discharge in bankruptcy, or the like.

Pleas in general. — Relating to the nature of pleadings in general it was a rule that every pleading must be an answer to the whole of what was adversely alleged. If only to a part, the plaintiff must sign judgment for the part of his claim not answered, or his whole action would be discontinued. Another rule was that every pleading is taken to confess such traversable matters as it did not traverse. The defendant might, however, pass over, by *protestation*, an allegation while admitting it for the purposes of the present action; and such admission did not conclude him from denying the like allegation in another action, if the present issue were decided in his favor. And the protestation must not be repugnant to his pleading, nor be taken on matter which the pleading traversed.

But to the general rule that the party must either demur or plead by way of traverse, or confession and avoidance, there were several exceptions: (1) In the case of dilatory pleas, which did not either deny or confess; (2) Pleadings in estoppel, which neither denied nor confessed, but set up matter to show that the opposite party was estopped by his former words or conduct from averring to the contrary of what he had before done or said; (3) The *new assign-*

ment, which was pleaded as a replication, where the declaration was in such general terms, or so ambiguous, that the defendant had pleaded facts, which, while literally an answer to it, were not an answer to the real claim of the declaration. In such case, the plaintiff, in his reply by way of new assignment, set up a more specific statement of the cause of action, and showed that the defendant's plea had no application to it. The new assignment took the place of the declaration, and the defendant could plead to it anew. It chiefly occurred in the action of trespass.

10. *Rule II. Upon a traverse, issue must be tendered.*

—The tender of issue, where the party proposed trial by jury, was thus: The defendant, after traversing the declaration or any subsequent pleading of the plaintiff, used this formula: "And of this, the [defendant] puts himself upon the country," by which he meant a tender of issue to be tried by a jury. When the plaintiff tendered issue for a jury, he said in his pleading: "And this the said [plaintiff] prays may be inquired of by the country." This was called "concluding to the country." The rule was sometimes stated that upon a negative and an affirmative, the pleading should conclude to the country, but otherwise with a verification; and when new matter, other than a common traverse, was introduced, the pleading should always conclude with a verification, — that is, in the words, "And this the said [plaintiff or defendant] is ready to verify."

11. *Rule III. Issue when well tendered must be accepted.*

—The other party had no option. If well tendered, he could not demur; and he could not traverse a traverse, for that would be aimless reiteration, and, if permitted, the parties might altercation affirmance and denial forever. The pleading, by which issue tendered was accepted, was called

the similitur, and was in these words in cases of trial by jury: "And the said A B [plaintiff] as to the plea of the said C D [defendant] whereof he hath put himself upon the country, doth the like" (*similitur*). If the traverse was bad, it was ill-tendered; and the opposite party might demur. The rule applied to an issue of law; but the issue of law, whether well or ill-tendered, must be accepted; there could be no demurrer upon a demurrer.

12. Rules to secure Materiality of the Issue: *Rule I. All pleadings must contain matter pertinent and material.* — In pleading, the allegation must be of *material* facts; and the denials or traverses must be of such facts as were material. Subordinate rules were laid down to enforce this general one: (1) Traverses must not be taken upon an immaterial point, or on matter prematurely alleged, or matter in inducement or aggravation. But where there were several material allegations, it was optional with the pleader to traverse such of them as he pleased. (2) The traverse must not be too large nor too narrow. It was too large — (a) when it included in the issue particulars of quantity, time, circumstance, etc., which, though properly a part of the allegation traversed, were not material to the merits. Thus, if A alleged that B assaulted and beat him at a certain time and place, a traverse that he did not beat him at that time and place would be too large. The gist of the denial might be upon the particular time or place which were immaterial. (b) When taken in the conjunctive instead of the disjunctive. Thus, if the allegation was that B had taken and carried away the horses, sheep, and swine of A, a traverse that B had not taken and carried away the horses, sheep, and swine would be bad. But a party might traverse allegations of title or estate to the full extent that they were alleged,

though they were alleged to a greater extent than they need have been.

A traverse was too narrow — (1) when it contradicted only a part of that which was adversely alleged, and still showed that the other party was entitled to recover; (2) when it was applied only to part of an allegation which the law deems indivisible, such as that of a prescription or a grant.

13. Rules to secure Singleness or Unity of Issue:

Rule I. Pleadings must not be double. — This rule meant that none of the pleadings was to contain several distinct answers to that which preceded it. The aim was to produce a single issue. Hence, in early times there could be but a single answer to a single claim; but one might plead to several distinct claims in the same declaration an answer to each. If a defendant had several defences to the same cause of action, he could plead but one. Where there were several defendants, each could plead his own plea, though different from those of his co-defendants. A pleading was double — (1) when it contained several answers, whatever their class or quality, to the same claim, (2) though the matter was ill-pleaded. But matter did not make the pleading double — (1) that was immaterial; (2) nor when it was pleaded only as necessary inducement (or introductory) to another allegation; (3) nor when, however multifarious, it constituted together but a connected proposition or entire point; (4) nor when a protestation was contained in the pleading.

The rule against duplicity was qualified and evaded in practice, (1) by the use of several counts, and (2) by the allowance of several pleas. Several counts came to be used in the declaration in instances where the plaintiff had several causes of action, of such similar class that they could be united and included in one writ. Each cause of

action was set up in a separate count, complete in itself. The defendant might demur to the whole, plead to one or more of the counts and demur to others, plead one plea applicable to the whole, or a several plea to each, thus producing several issues.

The rule against duplicity was also qualified by another method. There came into use anciently a mode of setting forth the same cause of action in different ways in separate counts, shaping each differently, stating the cause of action variously as to some of its facts and circumstances, so that if the proofs failed to sustain one form of statement they might support another of the counts, or one count might be good in law when the others were insufficient. In some cases the facts relied on might be different, as in case of different breaches of the same penal bond. This practice became universal in declarations in assumpsit, and gave rise to "the common counts," still in use in all jurisdictions where the common-law system of pleading is retained. By this practice, the declaration in assumpsit sets forth several counts, alleging a promise to pay a specified sum, (1) for goods sold and delivered, (2) for work and labor done, (3) for money lent and advanced, (4) for money paid, (5) for money had and received, (6) for money due on an account stated. All these were alleged in the declaration, so as to appear distinct and different claims. The rule against duplicity was avoided by the resort to the fiction of alleging the claims to be different and distinct.

The Several Pleas.—As has been said, the defendant formerly could plead but a single plea, and if he had several answers, each of which was a defence, he must choose the one he deemed the surest, and stand or fall upon it. The hardship of this rule led to the statute of 4 Ann. c. 16, 4, which allowed "a defendant . . . in any action or suit . . . to plead as many matters as he should deem necessary for his defence." Under this statute, the prac-

tice soon began of (1) pleading first the general issue, and then as many special pleas in bar as the defendant had; (2) and of pleading the same plea in different forms of statement, in the same manner as counts were variously stated in the declaration.

At first the court, by whose leave these several pleas were allowed, refused to permit pleas that were inconsistent with each other; but finally the practice relaxed, and the only pleas deemed inconsistent and too repugnant to be allowed together, were the general issue and the plea of tender. This statute extended only to pleas, and not to subsequent pleadings in the series; and it applied to pleas in bar only, and not to dilatory pleas. Each several defence must be pleaded as a new and further plea; and the words, "by leave of the court, for this purpose first had and obtained according to the form of the statute in such case made and provided," were used as introductory to each further plea.

14. Rule II. *It is not allowable both to plead and demur to the same matter.*—This was duplicity. Distinct statements or counts might be met, one with a demurrer, the other with one or more several pleas. The statute of 4 Ann. allowed several pleas, but did not extend to a demurrer, nor permit demurrers and pleas to the same matter.

15. Rules to produce Certainty or Particularity of Issue: Rule I. *Pleadings must have certainty of place.*—It was requisite in pleading to "lay a venue." This meant that the declaration must allege the place (parish, town, or hamlet) where the facts constituting his cause of action arose, so that the jury could be summoned from that vicinity; for, originally, the jury was selected from the neighborhood (*visne*) because of their

supposed knowledge of the facts in dispute. Later, the law was changed. Jurors were then summoned, not from the neighborhood, but from the body of the county, and not for their supposed knowledge of the facts, but they were to decide from the testimony given before them as a jury. There then came to be recognized the distinction between local and transitory matters, and from that distinction the classification of actions as *local* or *transitory*.

Local actions were those in which the principal facts were local, or carried with them the idea of some certain place. They mostly related to realty, to lands, tenements, and hereditaments. The principle was that in actions affecting realty the venue must be laid in the county where the lands were situated.

Transitory actions were those which might be supposed to have arisen anywhere. They were not associated with the idea of place, and comprised debts, contracts, and matters relating to personal property and personal injuries. In such actions the plaintiff laid his venue where he chose. If he laid a false venue the defendant might move to have it changed,—a practice which still exists in modern procedure for a change of venue.

16. *Rule II. Pleadings must have certainty of time.*—In personal actions, the plaintiff must allege the time,—that is, the day, month, and year when each traversable fact occurred. But he need not generally allege the true time. He might “lay it under a *videlicet*,”—that is, preceding it by the words “to wit,” or “that is to say,”—if he did not wish to be required to prove it strictly as alleged; but he must not allege an *impossible time* nor a *time inconsistent with the facts* to which it related; nor could he allege a time under a *videlicet*, and prove another time, when time was the material point in the merits of the case. In real or mixed actions, it was

generally unnecessary to allege time by day, month, and year, but only to show in what king's reign the matter arose.

17. *Rule III. The pleadings must show quality, quantity, and value*; and where the declaration alleged injury to goods and chattels, their quality, quantity, and value or price must in general be stated. So in actions to recover real property its quality — whether houses, lands, or other hereditaments, or whether pasture, meadow, etc. — must be specified, and also the quantity. In actions for injuries to real property its quality must be stated. The value, when stated, must be with reference to the current coin of the realm; for example, "twenty pounds of lawful money of Great Britain." Quantity must be expressed in the ordinary measures of weight, extent, capacity, etc. This rule was not always applied strictly; and quality and quantity might sometimes be expressed in a loose and general way, as "two packs of flax," "a library of books," "several keys," etc. In such actions as *debt* and *assumpsit* the allegations of quantity and value were not so essential. In the latter action, the allegation was that "the defendant being indebted to the plaintiff for goods, etc. (without specifying quantity or price), undertook and promised to pay" a sum specified. It was not generally necessary that the proofs as to quantity or value should correspond with the averment. The pleader might allege one quantity or price and prove another; but the verdict could not in general be had for more of either than was alleged. They were generally laid to cover the utmost that could be proved. The allegation of quality must be proved as alleged.

18. *Rule IV. Pleadings must specify the names of persons.* — The writ and declaration must both accurately

give the names of both parties, each described by his Christian name and surname; and his dignity or social rank, as earl, gentleman, yeoman, etc., must be given. If the names were not known, the fact must be stated in excuse for the omission. A mistake of the name of a party was ground for plea in abatement. But the name of a person, not a party, must be proved as alleged, under peril of a fatal variance.

19. *Rule V. Pleadings must show title.* — When any right or authority was set up in respect to property, real or personal, some title must be alleged in the party or in some one from whom he derived his authority. Under this rule were several of a subordinate character.

I. It was often sufficient to allege title of possession only; and this was done by alleging that they were "the goods and chattels of the plaintiff," or that he was "lawfully possessed of them as his own property." Where title of possession was applicable, it would be sufficiently sustained by proof of any present, immediate interest, whether temporary and special, or absolute and permanent. Where title of possession was alleged in respect to corporeal or incorporeal hereditaments, it was sufficiently established by proving any kind of an estate in possession, whether in fee, fee tail, for life, or years. Title of possession was in many cases sufficient, without showing title of a superior kind, as against a wrong-doer, — that is, against one who had committed an injury to such possession, having, as far as appeared, no title in himself. But this did not apply to the action of replevin.

II. But when the averments of title of possession were insufficient, and title must be alleged, other rules of a somewhat technical character applied, which were as follows: Where title, other than possession, must be pleaded, it should in general be alleged in its full and precise extent.

Under this must be considered first the allegation of title, and secondly, the derivation of title. (1) To allege title in fee simple the allegation was that the party "was seised in his demesne as of fee," without showing the derivation or (as the pleaders termed it) the commencement of the estate. This was so, whether the fee was conditional or determinable. When derivation must be alleged, it was alleged to have been in some one from whom it was derived, and then it was alleged how it passed from such person to the one claiming to hold it. If it passed by descent, it must be shown how; or if one claimed a superior title from the same source from which it was claimed by another, he must show that it passed to him by a prior conveyance or other transfer. (2) The commencement of a particular estate (even though a copyhold of inheritance) must be shown; that is, the derivation of it must be shown from the last seisin in fee, and if derived by alienation or conveyance, the substance and effect of the conveyance must be set forth. But when title was alleged by way of inducement only, the commencement need not be alleged.

As to the derivation of title the following were the rules: (1) He who claimed by inheritance must in general show how he was heir; and if he claimed by mediate, not immediate, descent, he must show the pedigree. (2) If he claimed by conveyance or alienation, he must (a) show the nature of it, (b) which should be stated according to its legal effect rather than its form of words, in conformity to the general rule of pleading that things are to be pleaded according to their legal effect and operation; (c) and when the nature of the conveyance was such that at common law it would be valid without a deed or other written instrument, no deed or instrument need be alleged; but otherwise, where by the common law a deed or writing was necessary. Hence a devise must be alleged to be in writing duly executed. So conveyance by grant of things

that "lay in grant" must be pleaded, as such could pass only by deed. One exception to this rule obtained in practice, however. In pleading title under a lease for years it was usual to plead the indenture (or written lease signed by both parties), although the lease at common law might be good by parol.

III. But it was not always necessary to plead title in its full and precise extent. It was sometimes sufficient to allege a general freehold title. This was done by the allegation that the place was the party's own "close, soil, and freehold." This allegation occurred in the plea called *liberum tenementum*, by which the defendant in trespass *quare clausum fregit* interposed the *common bar*, as it was called, that the *locus in quo* (that is, the premises) was his own "soil, close, and freehold." This allegation would be sustained by proof of any estate of freehold, whether in fee tail, or for life, or in possession or expectancy on the determination of an estate for years, but not of an estate in remainder expectant on a particular estate of freehold or copyhold tenure.

IV. Where the pleader alleged title in his adversary it was not necessary to allege it more precisely than was sufficient to show a liability in the party charged or to defeat his present claim. While bound to know his own title, one was not presumed to know that of his adversary. To show a liability in the party charged, it was sufficient in most cases to allege a title in possession, and this might be supported by proof of some present interest or actual possession, though not an interest by way of remainder or reversion. In an action of debt for rent against an assignee of a term of years, it must be shown not only that he was in possession, but in as assignee; otherwise he would not be liable in debt. Where a title superior to that of possession must be pleaded in an adversary, it need be alleged only fully enough to show

liability. And where it was requisite to show derivation of his estate, it was sufficient to show such title by a *que* estate; that is, to allege precedent title in some one else from whom he derived it, and aver generally that the same estate vested in the adverse party without showing the manner of its vesting, as the pleader must have shown it if pleading a passing of such title to himself.

V. The rule that title must be shown was subject to an exception. It was not necessary to show it where the opposite party was estopped to deny it. Thus, in an action for goods, etc., sold and delivered, as the buyer, having accepted from the seller and enjoyed the goods, could not dispute the seller's title, it need not be alleged. The lessor need not allege his title in an action against the lessee, as the latter, having taken the premises and held under him, was estopped to deny his title. But the lessee need not admit title to a greater extent than might authorize the lease. So, where the heir, personal representative, or assignee of the lessor sued the lessee, he must allege such title as would pass to the plaintiff, or entitle him to sue. The heir in that case must allege that the lessor was seised in fee, for this the tenant was not bound to admit. Another exception to the rule was allowed by the statute of 2 Geo. II. c. 19, s. 22, but it is not necessary to mention it here.¹

20. *Rule VI. Pleadings must show authority.* — When a party justified an act under a writ, precept, or any other authority, he must set forth its substance and legal effect in his pleading. But distinctions existed as to the particularity with which one so justified under process: (1) Any person justifying under judicial process need not set forth the cause of action in the original suit in which the process issued. (2) If the officer justified under a

¹ 2 Saunders, 284 c. n. 3; 2 Chitty, 1st ed. 512.

writ, he need plead the writ only and not the judgment on which it was founded, for his duty obliged him to execute the writ without questioning the validity of the judgment. But a party to the suit, or stranger, not an officer, so justifying, must set forth the judgment as well as the writ. (3) The officer justifying under the writ must show that it was returned, if it was a writ of which he must make return; but this did not apply to a subordinate, — such as a deputy, — because he could not return nor compel a return of the writ. (4) Where it was necessary to plead the judgment of a superior court, the proceedings in the suit previous to the judgment need not be set forth, for the jurisdiction of such court is presumed. (5) Where the justification was founded on the process of an inferior English court or a foreign court, it must be shown that the cause of action arose within the jurisdiction of such court; but this was permissible in a somewhat general way.¹ (6) An authority constituted verbally, and in a general way, could be pleaded in general terms.

The allegation of authority, like that of title, must in general be strictly proved as laid.

21. Rule VII. *In general, whatever is alleged must be alleged with certainty.* — This rule was of wide application, and finds illustration in numberless examples, of which a few are here mentioned: In pleading the performance of a condition or covenant, it was not usually allowable to plead generally that the condition or covenant had been performed, but the time, place, and manner of the performance of each act to be performed must be specially shown, unless it led to great prolixity, when in conformity to another qualifying rule a more general mode of allegation was permitted. Several exceptions to the rule are to be noted: (a) Where the condition was for the performance of mat-

¹ Heard on Civil Pleading, 238.

ters set forth in another instrument, and these matters were in an absolute and affirmative form, a general plea of performance sufficed. (b) Where a bond was conditioned for the indemnifying of the plaintiff from the consequences of a certain act, and was sued upon, the plea of *non damnificatus* (that he had not been damnified) was proper without showing how he had been indemnified. (c) When in the excepted cases a general plea of performance was pleaded, the plaintiff, in order to attain a certain issue, must in his replication show particularly how the condition or covenant had been broken. Various other illustrations of this rule are given in the books.¹

Under the general rule as to pleading with certainty there were certain limiting or restrictive rules which may be briefly stated thus: (1) It was unnecessary in pleading to state that which is mere matter of evidence, — that is, such circumstances as merely tend to prove the facts alleged; or (2) matter of which the court takes judicial notice, or notice *ex officio*, such as matters of law, public statutes, the meaning of English words, the legal weights and measures, the subdivisions of the State or kingdom; and a vast number of matters and events which, because of their general publicity, the court is presumed to know; (3) matters which should come more properly from the other side; or (4) circumstances necessarily implied; or (5) what the law presumes. (6) A general mode of pleading was allowed where great prolixity was thereby avoided; or (7) where the allegation of the other side must reduce the matter to a certainty. (8) But no greater particularity was required than the nature of the thing pleaded will conveniently admit. (9) Less particularity was required when the facts lay more in the knowledge of the opposite party than of the pleader, and (10) less in matters of inducement or aggravation than in the main

¹ Steph. on Pl., Tyler's ed. 307; Heard on Civ. Pl. 243.

allegations. (11) With respect to acts valid at common law but regulated by statute as to their mode of performance, it was sufficient to use such certainty of allegation as was sufficient before the statute; but where a thing is originally made by Act of Parliament, and required to be in writing, as in case of a will of lands, it must be alleged to have been made in writing, and with all the circumstances required by the act.

22. Rules to prevent Obscurity and Confusion in Pleading: *Rule I. Pleadings must not be insensible nor repugnant.* — An insensible pleading is one that is unintelligible by the omission of material words, and the pleading is bad. So if it be repugnant, — that is, inconsistent with itself, — this was ground for demurrer. But if the second allegation, which created the repugnancy, be merely superfluous and redundant, so that it might be rejected from the pleading without altering materially its general sense and effect, it might be rejected upon the maxim, "*Utile, per inutile, non vitatur*" (The useful, by the useless, is not vitiated).

23. *Rule II. Pleadings must not be ambiguous or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the pleader.* — Pleadings were not objectionable as ambiguous or obscure, if they were "certain to a common intent," though not worded with absolute precision. If clear enough, by reasonable intentment, this sufficed; though a better expression might be possible, this was not an objection. One fault in pleading, under the head of ambiguity, was the negative pregnant.

A negative pregnant is such a form of negative expression as may imply, or embrace within it, an affirmative.

or, in other words, a denial that implies an admission, or might have such construction; and because its meaning was uncertain or ambiguous, the negative pregnant was construed as an admission of that affirmative which it implied or might be construed to imply. Thus, a denial of the allegation, "A struck B on X Street at one o'clock," in the words of the allegation, "A did not strike B on X Street at two o'clock," is a negative pregnant with the admission that at some other time or place he did strike him.

24. Rule III. Pleadings must not be argumentative, but must advance their positions of fact in absolute form, not leaving them to be collected by inference or argument. Thus, in trespass for carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods. "This is an infallible argument that the defendant is not guilty, but it is no plea." Two affirmatives do not make a good issue. If it be alleged that A was seised in fee, and the opposite party allege that he was seised in tail, this is not a good issue. The traverse is argumentative in its nature, denying the seisin in fee only by inference. Nor do two negatives make a good issue. Thus, if A allege that B did not do a thing, but neglected so to do, B cannot plead that he did not neglect to do the thing, but should allege affirmatively that he did it.

25. Rule IV. Pleadings must not be in the alternative.—One cannot plead that if a thing happened it happened without his knowledge; nor that the party did one wrong or another; as to say that he wrote and published, or caused to be written and published, a libel. This is bad for uncertainty. To say that A broke and entered Blackacre or Whiteacre avers nothing positively.

26. *Rule V. Pleadings must not be by way of recital, but must be positive in their form.*— This means that it is not proper to allege that *whereas*, A did a wrong to B; but it is proper to allege that he did the wrong. In pleading a deed it was not proper to allege that *it is witnessed* by such a deed that A made a grant to B, but it should be alleged absolutely that he made the grant. This mode of setting forth the instrument with a *testatum existit*, however, was permitted where it was merely inducement or introductory to some direct allegation.

27. *Rule VI. Things are to be pleaded according to their legal effect and operation*, and in stating an instrument or other matter in pleading, its form or language need not be set forth, but it should be alleged according to its legal effect and operation. For example, if one joint tenant should execute to his co-tenant a deed of his interest in the joint estate, by the words "gives, grants," etc., this, though in terms a grant, was in legal effect what is called a *release*; and it should be alleged that he *released*, not that he *granted*. And where a tenant for life or years grants his estate to the reversioner, this, in legal effect, being a surrender, it should be alleged, not that he granted, but that he surrendered, etc.

28. *Rule VII. Pleadings should observe the known and ancient forms of expression, as contained in approved precedents.*— In ancient times certain forms of expression were essential, and certain formulæ of pleadings having become established as sufficient and proper, it was prescribed as a rule that they be adhered to, lest new questions might arise, and courts be required to spend much time in construing each pleading, if the pleader were left to choose his own manner of statement. The rule applied to those forms of most frequent and ordinary recurrence,

but was rather of uncertain application, as but few forms of expression had become so fixed by precedent as to admit of no variation.

29. Rule VIII. *Pleadings should have their proper formal commencements and conclusions.* — Certain formulæ had become fixed, by which pleadings subsequent to the declaration were commenced and concluded, and indicated the view the pleader had taken of his plea, whether it was to the jurisdiction, in suspension, abatement, or bar; and the class or character of the pleading depended upon its formal commencements and conclusions. If it commenced and concluded as a plea in bar, but contained matter only in abatement, it was a bad plea in bar and no plea in abatement. But if it commenced and concluded in abatement, and contained matter in bar, it was a plea in abatement only.

FORMS OF COMMENCEMENT AND CONCLUSION OF PLEAS.

Of a plea to jurisdiction, — the said C D, defendant, prays judgment if the court here will or ought to have further cognizance of the plea aforesaid.

Conclusion of a plea in abatement, — prays judgment of the said writ and declaration, and that the same may be quashed.

Conclusion of a plea in abatement to the person of the plaintiff, — prays judgment if the said A B, plaintiff, ought to be answered to the declaration aforesaid.

Commencement of a plea in bar. — And now comes the said C D., defendant, by —, his attorney, and defends the wrong and injury when and where, etc., and says that the said A B, plaintiff, ought not to have or maintain his action aforesaid, because he says [*here state the matter pleaded in bar*].

Conclusion of a plea in bar. — [*When the plea in bar is merely traverse, conclude to the country thus*]: And of this, he, the said C D, defendant, puts himself upon the country.

[*When the plea is of new matter by way of confession and avoidance, conclude thus, with a verification and prayer for judgment*]: And this the said C D, defendant, is ready to verify. Wherefore he prays judgment if the said A B, plaintiff, ought to have or maintain his aforesaid action against him, the defendant.

Of commencement and conclusion of a replication to plea to jurisdiction. — And the said A B, plaintiff, says that notwithstanding anything by the said C D, defendant, above alleged, the court here ought not to be precluded from having further cognizance of the plea aforesaid, because he says [*here state the matter pleaded in replication*].

Conclusion of such replication. — Wherefore he prays judgment, and that the court here may take cognizance of the plea aforesaid, and that the said C D, defendant, may answer, over, etc.

Commencement and conclusion to a replication in abatement. — [*Give actio non as above, and then*] says that his said writ and declaration ought not to be quashed, because he says [*here state what is to be pleaded in replication, and then conclude to the country if the replication is merely traverse, or with verification and prayer for judgment if new matter is pleaded*].

Commencement and conclusion to a replication in bar. — And the said A B, plaintiff, by —, his attorney, says that by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said C D, defendant, because he says [*here state matter pleaded in replication and conclude with verification and prayer for judgment, or to the country, as the case may be*].

Conclusion to replication to plea in bar, in debt. — Wherefore he prays judgment, and his debt aforesaid, together with his damages by him sustained by reason of the detention thereof, to be adjudged to him.

Conclusion of replication to plea in bar, in covenant. — Wherefore he prays judgment, and his damages by him sustained by reason of the said breach of covenant, to be adjudged to him.

Conclusion to replication to plea in bar, in trespass. — Wherefore he prays judgment and his damages by him sustained by reason of the committing of the said trespass, to be adjudged to him.

Same, in trespass on the case, in assumpsit — prays judgment and his damages by him sustained by reason of the not performing of the said several promises and undertakings to be adjudged to him.

Same in trespass on the case, in general — prays judgment and his damages by him sustained, by reason of the committing of the said several grievances, to be adjudged to him.

30. Rule IX. *A pleading which is bad in part is bad altogether*, — that is, if in any material part, or in reference to any material things which it undertakes to answer, the pleading be bad though otherwise unobjectionable, it was open to demurrer. This rule resulted from the one last stated, that pleadings must have their proper commencements and conclusions. A pleading was offered as an answer to the whole of that which last preceded it in the series. If it was not a sufficient answer to the whole, although it might be to some parts of it, or some counts or some one of several pleas, it was bad. Its commencements and conclusions indicated that it was an answer to the whole, while a part of the preceding pleading was not answered. The pleading, instead of being a partial answer, was deemed bad altogether.

31. Rules to prevent Prolixity and Delay in Pleading.
Rule I. *There must be no departure in pleading.* — A departure took place when the party pleading deserted the

ground that he had taken in his last antecedent pleading, and resorted to another. It could not take place till the replication, and happened most frequently in the rejoinder. The desertion might be from a point of fact first taken, or it might be from a point of law; as where the pleader relied in his first pleading upon the effect of the common law, and in a later one on a statute or a custom. The rule against a departure was necessary to prevent the retardation of the issue; for if a ground once taken could be abandoned and a new demand or defence substituted, the parties might continue the pleadings indefinitely without coming to an issue.

32. Rule II. *When a plea amounts to the general issue, it should be so pleaded.*— This rule means that if the defendant, instead of traversing the declaration by the form of the general issue (heretofore explained), specially sets up matter that merely amounts to the general issue, and which he might prove under the plea of the general issue, his plea is bad, and the plea of the general issue ought to be substituted. Thus, in trespass for entering plaintiff's garden, the plea that the plaintiff had no garden amounts simply to a plea of the general issue of "not guilty," and, therefore, should be so pleaded. In an action of debt for goods sold, the plea that the plaintiff did not buy them, or that the plaintiff had no goods, or that they were never delivered, amounts simply to the general issue of *nil debet*. Such a plea, when in the negative form, was faulty in being argumentative, for it rather argued that the former adverse pleading, which it answered, was untrue, than positively traversed it. But a plea would be saved from the fault of argumentativeness, by giving express color, or by giving sufficient implied color. The objection that a plea amounting to the general issue was not so pleaded was not a fatal one. The court could, in

discretion, allow such special plea ; or it might, on motion, set it aside and substitute the general issue. The object of the rule was to avoid prolixity ; as the special plea operated to retard the issue and “ make long records.”

Rule III. Surplusage is to be avoided. — This means that unnecessary matter, of whatever kind, should not be inserted in a pleading. Brevity and conciseness were regarded as the perfection of pleading, — to allege just enough and no more. The rule was much disregarded at one period in legal history, hence the cumbersome verbiage of some of the forms. The rule may be considered — (1) as prescribing the omission of all foreign matter ; an example of which is seen where one sues on a single covenant in a long deed, and sets out all the other covenants relating to matters entirely irrelevant ; (2) as prescribing the omission of matter not required to be stated, such as matter of law, matters judicially noticed or necessarily implied, etc. ; (3) as cultivating brevity and avoiding prolixity in the manner of statement, and adopting a terse style of allegation.

Surplusage was not ground for demurrer ; the maxim being that *Utile, per inutile, non vitiatur* (The useful, by the useless, is not vitiated). Gross fault of this kind was noticed by the judges. On motion made for the purpose, the pleading would sometimes be referred to the master to have the redundant matter stricken out ; and the judges would sometimes direct it to be expunged at the cost of the offending pleader. The use of surplusage was otherwise dangerous. Though immaterial matter need not, as a rule, be traversed, yet when it so was blended with material matter, in needless detail of circumstance, the essential and non-essential together, and so connected as not to be separable, the opposite party might include in his traverse the whole matter alleged, and the pleader who

had cumbered his pleading with the surplus matter might be compelled to prove it as alleged, in all its detail; and thus he incurred greater risk of failure of proof or variance.

33. Miscellaneous Rules: Rule I. *The declaration should commence with a recital of the original writ.*—This was a formal requirement. The form was, “C D [the defendant] was summoned [or attached] to answer A B [the plaintiff] of a plea [of debt or trespass as the case might be.]”

34. Rule II. *The declaration must be conformable to the original writ.*—This was an ancient rule and technically applied. But it lost much of its force in later times, when the practice was changed so that a variance between the writ and the declaration could not be pleaded in abatement.

35. Rule III. *The declaration should, in conclusion, lay damages and allege production of suit.*—By “laying damages” was meant that the declaration must contain the allegation that the injury “is to the damage” of the plaintiff an amount which he specified. In personal actions that “sound in damages,” where damages are the main object of the suit, they were laid in a sum large enough to cover the whole demand. In other actions, they were usually laid at a small sum. “*The production of suit*” was the use of the words, in conclusion, “And therefore he brings his suit.” This formerly had a meaning; as anciently the plaintiff was required to establish his declaration in the first instance before the defendant he pleaded. By his suit or following, he meant the persons who were ready to confirm his allegations. In other words, it was an offer to prove his statements, serv-

ing much the same purpose as the verification in the later pleadings.

36. Rule IV. *Pleadings must be pleaded in due order.*

— The order of pleading the defendant's pleas was as follows :—

1. He might plead to the jurisdiction of the court, — that is, allege facts showing that the court had no jurisdiction of the action.

2. He might, after the decision of that plea, plead to the disability of the person, (*a*) of the plaintiff, — that is, he might plead in abatement of the action that the plaintiff was dead, or a fictitious person, an alien enemy, outlawed or attainted, or (unless he sued with others as executor) that he was an infant, or a feme covert suing alone, etc. ; or (*b*) of the defendant, that is, her coverture, etc., or other disability.

3. He might then plead to the declaration or count. Anciently the defendant might demand oyer of the writ, and if there were a variance between the writ and count or declaration it might be pleaded in abatement. But this long since ceased to be allowed.

4. He might next plead to the writ : (1) To the form of the writ, — (*a*) for matter apparent on the face of the writ, such as repugnancy or variance in the form of the record, want of sufficient time between the teste and return, or omission or mistake in the defendant's addition, either of estate, degree, or mystery ; (*b*) or to matter *dehors* (or out of) the writ, such as misnomer, or that the parties sued as husband and wife were not married, or that one of the parties, plaintiff or defendant, were dead, or fictitious persons, or some other non-joinder of parties. (2) To the action of the writ, that the action was misconceived, prematurely brought, or sometimes that another action was pending for the same cause between the same parties.

5. To the action itself in bar thereof. In this order the defendant must plead, and might plead all these pleas successively, but could not plead more than one plea of the same kind or degree. He could not plead two pleas to the jurisdiction, nor two to the disability of the person; but, as has been noted, he might, after the statute of 4 Ann., plead several pleas in bar. If he passed over any plea in its order, he waived it, and could not, after the decision of a plea later in order, go back and plead it. If an issue in fact be taken on any of these pleas, though of the dilatory class only, the judgment either terminated the action, if the plea were successful, or suspended it, if in suspension. In the dilatory pleas, judgment against the defendant was *respondeat ouster* (that he answer over, or plead again).

Rule V. Pleas must be pleaded with defence, — that is, with a certain form of words, thus, in trespass, “And the said [defendant] by —, his attorney, comes and defends the force and injury, when, etc.” In other and personal actions, it was, “And the said defendant, by —, his attorney, comes and defends the wrong and injury when, etc.” The “when, etc.,” used in the words of defence, supplied the place of words once inserted at length, viz. : “When and where it shall behoove him, and the damages and whatsoever else he ought to defend.” The word “comes” expressed the defendant’s appearance in court. The word “defends” imported denial of plaintiff’s rights, though it did not amount to traverse. The use of these words and the rule requiring it, though they are still retained in the common-law system, were “verbal subtleties,” without logic or reason to support them.

37. *Rule VI. Pleas in abatement must give the plaintiff a better writ*. — This rule meant that the defendant,

when pleading a mistake of form in abatement of a writ or bill, must correct the mistake so that the plaintiff might be informed how to avoid the objection. The rule was founded in reason. Such pleas tended to delay justice and were not encouraged. This rule served, too, as a criterion to distinguish whether matter was pleadable in abatement or bar. For if the plea impugned the right of action, of course no better writ could be given. But if a better writ could be given, — that is, if by correcting some error of form or fact the plaintiff could maintain the suit, — then the plea should be abatement.

38. *Rule VII. Dilatory pleas must be pleaded at a preliminary stage in the suit.* — Not only must they be pleaded in order, but could not be pleaded after full defence, general imparlance,oyer, view, voucher, or plea in bar.

39. *Rule VIII. All affirmative pleadings which do not conclude to the country must conclude with a verification.* — As a traverse, tendering issue to be tried by jury, must conclude to the country, so affirmative pleadings must conclude with another formula called a verification. These were two kinds, common and special, — the common, when a jury trial was intended, and this was in the words, “And this the plaintiff [*or* defendant] is ready to verify;” the special, when some other method of trial was intended, as, “And this the plaintiff [*or* defendant] is ready to verify by the record [*or* certificate],” “*or* when, where, and in such manner as the court shall order, direct, or appoint.” This rule rested upon an old doctrine of the law that every affirmative pleading must be supported by an offer of some mode of proof. Such was not required in case of negative pleadings; but it became the practice to conclude them with a verification when they did not conclude to the country.

40. *Rule IX. In all pleadings where a deed is alleged, under which the party claims or justifies, proffer of such deed must be made.* — In other words, he must proffer the deed in such a formula as this, "One part of which said indenture [or other deed], sealed with the seal of the said —, the said plaintiff [or defendant] now brings here into court, the date whereof is the day and year aforesaid." The rule applied to *deeds* only, — that is, to instruments under seal, and letters testamentary or of administration, — and only when it was necessary to mention the deed in the pleading, and to claim or justify under it, relying on the direct and intrinsic operation of the deed. There were exceptions to the rule: (1) In pleading a conveyance under the Statute of Uses, it was not required to make proffer of the lease and release, because the statute gave effect to them, to establish the title. (2) When the deed was lost or accidentally destroyed, or in the possession of the opposite party, proffer need not be made, but the reason why was thus stated: "Which said writing obligatory [or other deed] having been lost by lapse of time" or "destroyed by accidental fire," or "being in the possession of the said —," "the said — cannot produce the same to the court here." The reason of the rule was to enable the court by inspection to judge of the sufficiency of the deed; and it rested on the doctrine that all affirmations must be followed by some offer of proof.

41. *Rule X. All pleadings must be properly entitled of the court and the term.* — The title consisted of a super-description of the name of the court, thus: "In the King's Bench," "In the Common Pleas," "In the Exchequer." The term in the title was either general, thus: "Trinity term in the fourth year of the reign of King George the Fourth;" or special, thus: "Monday next, after fifteen days of the Holy Trinity in the (*year of reign*)."

referred to the time when the party was supposed to deliver his pleading orally in court, and presumably on the first day of the term. When filed or delivered in vacation, the title was of the term last preceding. It was usual to entitle generally unless the cause of action arose after the first day of the term, then specially as of some day later than the accruing of the action.

42. *Rule XI. All pleadings ought to be true.* — This rule was not generally enforceable, as the falsity of a pleading could not be proved till the trial. A practice grew up, and was tolerated, of interposing *sham pleas* merely for delay. The most common of these was the plea of a former recovery on the same cause of action. When not in the usual and tolerated form, and the matter pleaded was very improbable and presumably intended as sham, the court would, on motion, supported by affidavit of its falsity, allow judgment to be signed as for want of a plea. The rule also had exceptions in the fictions allowed in some pleadings, such as the declarations in ejectment and trover heretofore mentioned, and the fictitious allegations necessary to give the courts of King's Bench and Exchequer jurisdiction of actions more properly within the cognizance of the Common Pleas.

The foregoing is a brief statement of the rules of pleading in common-law courts. They are here spoken of as existing in the past, because the codes purport to abolish them. But they are now in use in such of the States as still retain the ancient system, — much modified, however, and shorn of their ancient technicality. In the States which have adopted the code of procedure, the rules of pleading that relate to the formal structure of the plead-

ings have been swept away. Such of them as rest upon principles of logical statement, and without regard to form, tend to produce materiality and certainty of issue, and to prevent obscurity, confusion, or prolixity, either reappear in the express provisions of the code, or are held by the courts to inhere in the new system as implied from its general and comprehensive provisions.

Before considering the code, it is now necessary to take a glance at the nature of courts of equity, their jurisdiction, and system of pleading.

SECTION III.

OF COURTS OF EQUITY.

43. **Courts of Equity and their Jurisdiction.**—In the English system, the king was regarded as the source and fountain of justice, and the courts of the common law were merely his aids in administering it. Their jurisdiction extended only to the cases and forms of action for which writs had been, or under authority might be, devised. The narrow range of remedial justice to which they were confined often compelled suitors, who found no adequate remedy in the actions and proceedings which could be brought in the law courts, to apply to the king for a redress of their grievances. For a long time he heard these petitions in person, and administered an imperfect and not always uniform kind of equity. The number of applicants increased as the kingdom grew, and exacted too much of the royal attention. It therefore became the practice to refer them for decision to the chancellor, who was the confidential adviser of the king, especially in matters of conscience. At length, in the twenty-second year of Edward III. (A. D. 1399), an ordinance or proclamation

of the king declared his will that "whatsoever business, relating as well to the common law of our kingdom as our special grace before us, from henceforth be prosecuted before . . . our chancellor, by him to be despatched; and the other matters grantable by our special grace be prosecuted before our said chancellor or our well-beloved clerk, the Keeper of the Privy Seal, so that they, or one of them, transmit to us such petitions of business which, without consulting us, they cannot determine, together with their advice thereupon, without any further prosecution to be had before us for the same; that, upon inspection thereof, we may further signify to the aforesaid chancellor or keeper our will and pleasure therein; and that none other do for the future pursue such kind of business before us." This ordinance gave rise to the Court of Chancery, and an exalted jurisdiction from which has come in the progress of centuries the great system of equity jurisprudence.

44. Heads of Equity Jurisdiction.— In the course of time the jurisdiction of the Court of Chancery became clearly defined, and ranged itself under the following general heads: *Fraud*. Equity so abhors fraud that it lends its aid to overthrow it; to set aside contracts tainted with it; to compel surrender of contracts, the restoration of property dishonestly obtained, the cancellation of instruments or records; to reach property held under constructive trusts, and prevent all fraud by parties or others in fiduciary relation. *Accident*. Equity relieves against the consequences of accident in some "cases of extremity." Its aid is invoked in three cases under this head, viz.: (1) lost instruments; (2) defective execution of powers; (3) penalties and forfeitures, but not forfeitures imposed by statute against which, as a rule, equity will not relieve.¹ *Mistake*. Where parties to contracts make mis-

¹ Pom. Eq. Jur. §§ 1378-1383.

takes, whereby the contract fails to express their intent, equity upon clear showing will correct the mistakes and reform deeds or contracts to conform to actual intent. As against mere mistake as to plain, clear rules of law, equity will not generally relieve a party; but where an agreement has been made, and in reducing it to writing the parties, through mistake of law, fail to express the contract which they made, equity will relieve, to reform or cancel as the case may require. But the mistake of law must be on a material point; and there must be no mistake in the legal import of the contract which was actually made. Where all parties act under the same misapprehension of the law, equity will interpose. So equity grants relief where one is mistaken as to his own existing legal rights, interests, or relations, for in such cases his mistake is generally one of fact, or mixed law and fact.¹ Mistake of law, accompanied by inequitable conduct of the other party, or between parties in relations of trust, is ground for relief; but payments made under misapprehension of clear rules of law, or compromises and settlements made upon mistake of legal rights, are not disturbed for mistake of fact or law. But mistakes of fact, when the fact is a material element of the transaction, not the result of the party's own breach of legal duty nor culpable negligence, may be relieved against.² *Account.* Mutual dealings between partners can be examined and adjusted only in equity. In other cases, where there are mutual accounts, or if on one side only, are complicated, or there are difficulties in the way of adequate relief at law, equity takes cognizance, as it does where the parties are in fiduciary relation.³ *Infants, Lunatics, Imbeciles, etc.* In England a prerogative exists in the crown as the *parens patriæ*, to be exercised by the Court of Chancery, for the protection of

¹ Pom. Eq. Jur. §§ 841-851.

² Id. §§ 852-857.

³ Id. §§ 1420-1421.

infants. In the United States there are special tribunals invested with authority to care for these helpless wards; but the courts of general jurisdiction, to whom there is a grant of Chancery powers either by constitution or statute, possess inherent jurisdiction for the care of the persons and property of infants;¹ and testamentary and statutory guardians are under their control.² The powers of the chancellor to issue a writ under the great seal in the nature of *de lunatico inquirendo*, and upon finding the person who was the object of inquiry insane, to take charge of his property and person, are not as a rule inherited by American courts as part of the inherent equitable jurisdiction.³ *Married Women.* Equity jurisdiction extends to the protection of the estates of married women when under common-law disability. But in most of the United States the statutes allow married women to own, control, and dispose of their property as if sole; and they may sue and be sued in respect to it in courts of law.⁴ *Specific Performance.* This is an important head of equity jurisdiction. Equity may in discretion enforce the specific performance of contracts respecting lands, and in a few instances relating to personalty, where damages for the breach would be inadequate, and where the plaintiff through his own failure in strict performance is remediless at law. *Foreclosure.* The foreclosure of mortgages, liens, and of the rights of pledgors is peculiar to courts of Chancery. Whatever the form of the mortgage or the lien, whether by reservation in the grant, or the vendor's lien, or the equitable mortgage by deposit of title-deeds, equity adapts its decree to the facts of the case and the rights of the par-

¹ *McCord v. Ochiltree*, 8 Blackf. 15; *Maguire v. Maguire*, 7 Dana, 181; *Williamson v. Berry*, 8 How. 555.

² *In re Andrews*, 1 Johns. Ch. 99; *Ex parte Crumb*, 2 Id. 439.

³ *Dowell v. Jacks*, 5 Jones Eq. 417.

⁴ Code Ref. 23-37.

ties. *Partition.* In English law, the Court of Chancery has concurrent jurisdiction with courts of law to compel partition of lands. In several of the States it is a proceeding in equity. In most of the States, however, the procedure is regulated by statute, but it closely follows the methods of Chancery. So, co-owners of chattels or personal property not in its nature divisible can resort to equity for sale and division of the proceeds.¹ In some of the States statutory actions are now provided. Replevin may be maintained where the property is divisible. *Dower.* The right of dower is purely legal, and from earliest times a legal action has been provided for its recovery. In the reign of Queen Elizabeth Chancery began to exercise jurisdiction in aid of legal proceedings to recover dower, and since has been invoked where impediments stood in the way of legal remedy. It is now settled that equity jurisdiction is concurrent in cases of legal dower and dower in legal estates.² It is exclusive where dower is claimed in equitable estates.³ In the code States, the action equivalent to ejectment is applicable to the recovery of dower.⁴ *Interpleader.* Where one A is in custody of a thing or a fund, and B and C set up distinct claims to it, and A, the custodian, is in doubt which of the two makes the valid claim, he may for his own protection file a bill in equity to bring them into court and compel them to litigate as between themselves. He must show that he has no interest in the thing or fund, and that he is not in collusion with either party; that there are such parties and that they set up opposing claims. *Trusts.* Equity has exclusive jurisdiction over trusts and charities. The powers of Chancery to compel disclosure, and to

¹ *Tripp v. Riley*, 15 Barb. 333; *Fobes v. Shattuck*, 22 Id. 568; *Wetmore v. Zabriskie*, 29 N. J. Eq. 62.

² Pom. Eq. Jur. § 1383.

³ *McMahan v. Kimball*, 3 Blackf. 1.

⁴ See Code Ref. 69-77.

⁵ See State codes.

search the conscience, are peculiarly adapted to the enforcement of trusts growing out of relations often secret and confidential. *Bills Quia Timet.* Bills in equity are sometimes entertained to guard against possible or prospective injuries, or to protect rights from future or contingent violation. To favor repose and tranquillity of life, equity holds that a man shall not be compelled to have hanging over him or his title, for an indefinite time, some claim or demand which, if established, would subject him to loss. He is entitled to have the matter settled at once and forever. Among the more frequent cases of bills *quia timet* are those where personal property is limited for life to one with an expectant interest analogous to remainder over, and the owner in expectancy fears that the tenant for life will injure, destroy, or allow the property to deteriorate. He applies to equity, and secures protection, compels security to be given, etc. Bills to perpetuate testimony, to remove clouds from title, and to establish lost wills, are in the nature of bills *quia timet*. Such bill may also be filed by a surety against his principal to compel him to pay the debt for which surety is bound.¹ *Bills of Peace.* Equity discourages a multiplicity of suits, and interferes to prevent them. When one has a right, and it may be called in question by various persons at different times, he may apply to equity for determination of the right and injunction against further litigation. Another class of bills of peace is the bill to quiet title, by one in possession against those who assert adverse claims. *Injunction.* Chancery exerts its power to prevent wrong or restrain its continuance by the injunction. The temporary injunction is issued as a writ. The permanent injunction is often contained in the decree or final judgment of the court. The instances in which injunction may be granted are too numerous to be here recapitulated. *Bills of Dis-*

¹ Pom. Eq. Jur. § 1417, n.

covery. Chancery formerly exercised an important jurisdiction in compelling discovery or disclosure of facts resting in the knowledge of the defendant, or deeds or writings of which he had custody or control. The bill of discovery was a valuable remedy, often resorted to in aid of proceedings at law, as evidence could be reached by it not otherwise obtainable; but the later and very general legislation allowing parties and others interested in suits to be witnesses and liable to be examined as witnesses at the instance of the adverse party, before as well as at the trial, has practically superseded the bill of discovery proper.

SECTION IV.

OF PLEADINGS IN COURTS OF EQUITY.

45. *Pleadings in Equity*.—The system of pleading adopted in courts of equity is derived partly from the procedure of the civil law, which obtained in the ecclesiastical courts of England, and partly from the common-law system. The aim of the latter system was, as has already been explained, to produce a single, simple issue, to which, if it were of fact, the proofs taken in open court could be directed. Only the facts, according to their legal effect, could be stated in the pleadings. Each form of action had its appropriate formulæ of words in commencement and conclusion; and the cause of action was stated in set phrases established by precedent, and was usually brief; and often the facts as alleged gave but slight intimation of the circumstances that would be proved to establish the cause of action.

The Chancery, adopting a different mode of trial, proceeded in a different mode of pleading. The whole case was submitted to the chancellor, or judge of the court

of equity, — the pleadings of the parties, their proofs taken out of court and reduced to writing, and the answer of the defendant, usually on oath for the purpose of “probing his conscience,” — and from the whole case the chancellor determined what the issues were, what facts were established, and gave his decree upon the equities of the case, as gathered from all the matter before him.

The pleadings in equity originally consisted of the bill of complaint, the answer (or instead of the answer, any plea that could be pleaded as a defence), the replication, rejoinder, etc., according to the common-law series; but long ago the serial system went out of use, the pleadings now ending with a formal replication. The course of pleading and the different classes of bills will now be briefly explained.

45 a. Bills of Complaint. — A suit in equity, under the procedure of the English Court of Chancery, which was generally adopted in the American States prior to the code, is instituted by the plaintiff filing a bill of complaint. The plaintiff is usually called the complainant, in the Federal courts the complainant or plaintiff indifferently. The bill is in substance a petition to the chancellor, or judge of the court of equity, setting forth at large the grounds of the suit, and praying the process of the court, its subpoena, to bring the defendant into court and compel him to answer the plaintiff's bill, and, also, for such relief by decree or interlocutory remedy, by way of injunction, etc., as the plaintiff supposes himself entitled to.

46. Different Kinds or Classes of Bills. — After the establishment of the Court of Chancery, its system of procedure, at first somewhat informal and indefinite, began to assume form. As its jurisdiction reached out to a vast range of matters, its rules and doctrines gradually became a

broad and comprehensive system of jurisprudence, supplementing and supplying the defects, and in many instances mitigating the harshness, of the law as administered in the common-law courts. Its practice became systematic and formal, and its remedies finally arranged themselves into classification. Bills of complaint came to be divided into two great classes : I. *Bills Original*; II. *Bills not Original*.

47. I. **Original Bills** are those praying decree touching some right claimed by the plaintiff, and relate to some matter not before litigated in the same court by the same persons, standing in the same interest or relation to each other. Original bills are of two kinds : (1) *Bills praying relief*, and (2) *Bills not praying relief*. In a general sense all bills pray relief, — that is, they seek the aid of the court in some matter of equitable cognizance. But the bill classed as one praying relief seeks a decree enforcing or giving effect to some right of the plaintiff in the suit, and deciding the merits of the controversy for the protection or redress of the rights or the preventing of present or apprehended invasions thereof. Bills not praying relief merely ask the aid of the court against some possible future injury, or to support or defend a suit in some other court of ordinary jurisdiction. When the court of equity thus lends its aid it is said to exercise assistant jurisdiction.

48. **Of Bills praying relief** there are three kinds : —

1. The most ordinary is the bill which prays decree or order of the court touching some right claimed by the plaintiff, in opposition to some right or claim of right of the defendant, or some alleged invasion of the plaintiff's right.

2. *Bills of Interpleader*. — The bill of this class sets up no right or cause of action for any wrong done the plaintiff, but alleges that two or more persons claim as against him some property, debt, or duty ; and that not

knowing which of them he ought of right to pay, or make delivery to or perform the duty for, he prays that he may interplead them, — that is, that he may be allowed to bring the debt or thing into court, or deliver it to whom the court may order; and that the opposing claimants be brought into court to litigate their conflicting claims in respect to it, and the plaintiff discharged with his costs. All the relief the plaintiff prays is that the court decree that his bill was properly brought, and that he deliver the fund or thing, if deliverable, into court, and be dismissed with his costs. The essential averments of the bill are: (a) The plaintiff must admit want of interest in the subject-matter; (b) He must make oath that he is not in collusion with either party; (c) He must offer to bring the money or thing into court, or perform the duty as the court may decree; (d) He must state his relation to the fund or thing and negative all interest in himself; also, the several claims of the parties sought to be interpleaded, lack of which statement is ground for demurrer; (e) The bill must show persons *in esse* (in being) who may be interpleaded; (f) The bill then prays that they be interpleaded and set forth their claims between themselves, and that the plaintiff be dismissed with his costs.

3. *Bills of Certiorari*. — These are bills filed in a superior court of equity to remove a cause from a lower or inferior court of equity to the superior court. The bill must allege the proceedings in the lower court and show its incompetency to act, — either from lack of jurisdiction or because the witnesses are not within its reach, or are not able through age and infirmity to follow the suit there, — or it must show some other cause from which justice is unlikely to be done. In this country this bill in equity procedure is rarely used.¹

¹ The statute of March 3, 1891, creating the Circuit Court of Appeals, authorizes the Supreme Court to remove cases from the Circuit Court of Appeals, before the Supreme Court itself, by writ of certiorari.

49. Original bills not praying relief are of three kinds: (1) Those to perpetuate testimony; (2) Those to take testimony *de bene esse*; (3) Bills of discovery.

1. *Bill to perpetuate the testimony of witnesses*, who were old, infirm, sickly, or about to go out of the State or beyond the jurisdiction of the court, whereby the plaintiff would lose the benefit of their testimony in some future litigation or apprehended controversy, may be filed in equity, to the end that the testimony thus likely to be lost may be perpetuated of record "in perpetual remembrance of the thing." The bill must show, "as ground for aid:" (1) subject-matter as to which the testimony is needed; (2) plaintiff's interest in it, and his right; (3) some interest or asserted claim of the defendant in the *res*, or thing; (4) the ground or necessity of preserving the testimony; (5) prayer for leave to examine the witnesses named, without other relief.

This bill is filed when no suit is pending concerning the matters on which the plaintiff desires to take testimony, and is anticipatory of future actions or suits in which the testimony may be needed.

In nearly all the American States a more summary and expeditious method is provided by statute to perpetuate testimony. The procedure is by petition, notice to others interested, and an order of the court or judge for the examination and recording of the testimony.¹

¹ *Sta.*,—Ala. §§ 2823-2831; Ark. §§ 2960-2961; Ariz. § 1839; Cal. §§ 2083-2087; Col. Code, §§ 365-370; Conn. §§ 1080-1083; Del. c. 56 (as to boundaries); Fla. §§ 1138-1141; Ga. §§ 3901-3905; Idaho, §§ 6116-6122; Ills. Hurd's *Sta.* '91, p. 713, § 39; Ind. § 441; Ia. §§ 4996-5001; Kan. §§ 4484-4490; Ky. §§ 610-616; Me. c. 107, §§ 22-28; Md. art. 35, §§ 22-33; Mass. c. 169, §§ 45-64; Mich. (Howell's) §§ 7477-7478; Minn. c. 73, §§ 47-48; Miss. §§ 1766-1776; Mo. §§ 3380-3393; Mont. §§ 664-670; Neb. § 1113; Nev. §§ 3438-3444; N. H. (1891) c. 226, §§ 1-9; N. M. § 2127; N. Y. (Bliss's *Ann. Co.*) 872; N. Dak. §§ 5317-5319; Ohio (1890), §§ 5873-5879; Okla. c. 70, §§ 24-

2. *The bill to take testimony de bene esse* is filed to enable the plaintiff to take the testimony of persons old, sick, infirm, or about to depart the territorial jurisdiction of the court, where their testimony was required in some action or suit presently pending, either in equity or at law, to be used on the trial or hearing. It is taken *de bene esse* (conditionally) to be used if the witness cannot be produced at the trial or regular examination. This bill was formerly of great utility, when no machinery was provided in the practice, to secure such evidence, but is now of little use in any courts, as statutory methods have been provided for taking such depositions in the suit or action to which the testimony relates, without bill filed for the purpose. The procedure now is to give the opposite party notice stating the reason for taking the deposition, the time, place, etc.¹

27; Ore. (Hill's An. Sta.) § 624; R. I. c. 214, §§ 30-32; S. Dak. §§ 5317-5321; Tenn. (Code 84) §§ 4634-4635; Tex. (Sayles') § 2218; Utah (1888), § 3966; Vt. §§ 1037-1042; Va. c. 172, § 40; Wash. (Hill's) § 1688; W. Va. c. 130, § 40; Wis. §§ 4117-4122; Wy. §§ 3066-3072.

¹ Ala. Sta. (1886) §§ 2801-2815, 3467-3470; Ariz. (1887) §§ 1833-1853; Ark. (1884) §§ 2910, 2920-2959; Cal. (Dering's Ann.) §§ 2020-2038; Col. (Rice's Co.) §§ 341-355; Conn. (1888) §§ 1068-1083; Fla. (1892) § 1123; Ga. (1882) §§ 3877-3892; Idaho (1887), §§ 6060-6064; Ill. (1891, Hurd) p. 710, §§ 24-38; Ind. (1889, Myers') §§ 448-449; Ia. (1888, McClain's Ann.) §§ 4972-4994; Kan. (1889) §§ 4441-4448; Ky. (Carroll's Co.) §§ 163-164; Me. (1883) pp. 829-835; Md. (1888) p. 694, art. 35, § 25; Mass. (1882) pp. 987-989; Mich. (1882, Howell's Ann.) §§ 7416-7459; Minn. (1891, Kelly) §§ 5154-5179; Mo. (1889) §§ 4434-4453; Miss. (1892, T. D. & C's Ann.) §§ 1747-1765; Mont. (1887) §§ 678-685; Neb. (1892, Comp. Ann.) p. 903, §§ 372-392; Nev. (1888, Bai. & Ham.) §§ 3429-3437; N. H. (1891) pp. 623-624; N. J. (1877) pp. 382-384; N. M. (1884) §§ 2095-2199; N. Y. (Bliss's Ann. Co. 3d ed.) pp. 1105-1131; N. C. (Battle's Rev.) p. 227; N. Dak. (Dak. 1887) §§ 5317-5322; Ohio (1890, Gianque), §§ 5261-5287; Okla. (1890) §§ 4455-4486; Ore. (1887, Hill's Ann.) §§ 812-829; Penn. (1883, Purd. Dig.)

3. A third class of bills not praying relief are *bills of discovery*. At common law a party could not be witness for or against himself in an action at law. It often became necessary to file a bill of discovery, as it is called, to enable the plaintiff to obtain discovery of facts material to his case, resting in the knowledge of the adverse party, or of deeds, muniments of title, etc., in custody of the defendant. While all bills are in a sense bills of discovery (because they require answer of matters within the defendant's knowledge, as to the matters alleged in the bill) the bill of discovery is peculiarly so called because it prays simply the discovery of the facts or papers in the defendant's knowledge or possession, without other relief. This bill is usually filed in aid of proceedings in some other court, or to enable the plaintiff to prosecute or defend some other action pending, and thereby to obtain facts or documentary evidence to support his contention in the action at law. The bill of discovery, pure and simple, is now generally made needless or is abrogated by statutes which remove the disqualification of interest, and allow parties to be examined as witnesses in their own or the adverse party's behalf. Discovery can be obtained by the simple procedure of examination before trial, and deposition taken, and inspection of documents called for, and the dilatory method of bill of discovery is now in disuse.

50. Original Bills of Special Kinds and Names. — Many original bills have come to have distinct names. Such are (a) bills of foreclosure wherein the mortgagee seeks to cut

p. 728-729; R. I. (1882) pp. 585-587; S. C. (1882) §§ 2210-2212; S. Dak. (Dak. 1887) §§ 5317-5322; Tenn. (1884, M. & P.) §§ 5212, 4589-4591; Tex. (Sayles') §§ 1816, 1825, 2218-2237; Utah (1898), §§ 3942-3955; Vt. (1880) §§ 1018-1045; Va. (1887) §§ 3359-3368; Wash. (1891, Hill's S. & C.) §§ 1666-1679; W. Va. (1891) pp. 827-829; Wis. (1878) §§ 4110-4134; Wy. (1887) §§ 2609-2635.

off the equity of redemption of the mortgagor ; (b) bills to redeem, in which the mortgagor prays to redeem his premises from the mortgage after he has broken the condition of the mortgage ; (c) bills to marshal assets, which are brought in favor of simple contract creditors, and sometimes by heirs, devisees, and legatees, to prevent specialty creditors from exhausting the personal estate of the decedent. The use of this bill for this purpose is practically obviated by laws generally adopted in the States, which place specialty and simple contract creditors on the same footing. The principle that "equality is equity" is often applied in marshalling the assets of partners, so that partnership creditors shall be paid out of partnership funds, and individual creditors out of the individual funds of the partners. To "marshal the assets" is to arrange them in due order, so that those applicable to one class of debts may be separated from those applicable to another ; (d) bills to marshal securities, which are brought by creditors having a claim or lien on one fund only to compel creditors having a prior lien on two or more funds to resort to the other fund, thus giving both classes of creditors a share ; (e) bills of peace, which are brought to prevent the vexatious recurrence of litigation by a numerous class of persons asserting against the plaintiff the same right, or to prevent the same individual from bringing against the plaintiff a succession of suits in the assertion of the same unsuccessful claim ; (f) bills *quia timet* (because he fears) are entertained by courts of equity to guard against some future injury, possible or prospective, because the plaintiff fears that his existing rights may be subject to future invasion by parties setting up a hostile claim but not suing to enforce it. The bill *quia timet* seeks to insure, confirm, or guard the right. It is sometimes brought when personal property is held for life by one person, with an expectancy or remainder over to another. The latter brings this bill against the possee-

sor for life to prevent deterioration or injury to the property, and to compel security to be given against the same. Of this species of bills are those to establish lost wills, to perpetuate testimony, to quiet title or remove clouds from it. Equity in such cases proceeds on the principle that one should not be obliged to live in fear, with some claim or demand hanging over him or his title, for an indefinite time, to his harassment, which if sued upon he might defeat, but which, in the future, under change of circumstances, loss of testimony or the like, it might be more difficult for him to defend. He invokes the aid of equity to have the question settled at once and forever.

Bills in the Nature of Other Bills.—There are also bills in the nature of other bills, such as bills in the nature of supplemental bills, which are brought when the interest of the plaintiff or defendant wholly determines, and the property becomes vested in other parties. The new parties then file an original bill in the nature of a supplemental bill. So a new bill of this nature may be filed, where new interests have arisen, either before or after a decree, or where relief of a different kind or upon a different principle from that of the original decree is required. Also, a bill in the nature of a bill of review is brought after the decree, but before it is signed and enrolled, to bring before the court new matter that has been discovered since publication in the original cause. There is the supplemental bill in the nature of a bill of review, which sets up new matter and prays that the cause be reheard on the supplemental bill at the same time that it is heard on the original bill.

51. II. *Bills not Original.*—It has been noted that an original bill is one that begins some litigation. The subject-matter of it, as to the same parties, has not been before the court. Bills not original are those in addition

to, or continuance of, the litigation commenced by the original bill. Of this there are several classes, or kinds:

52. 1. *The Supplemental Bill.*—This is filed—(1) when there is some defect in the original bill, from some omission of facts existing when it was filed; (2) when some necessary party or parties have been omitted, and it is too late to amend the bill; (3) when, after the suit has been decided on the main issues, it is found necessary that other matters be brought in, or a discovery had, in order to give full effect to the decision; (4) where new events or matters have transpired since the filing of the bill, and they refer to and support the rights already set forth in the bill. These often require the bringing in of new parties.

The old rule in equity required that the supplemental bill must state anew the facts in the original bill, and then state all the proceedings had in the court thereon. This tends to such prolixity that court rules generally change it; and courts will not allow a supplemental bill to be filed, except on leave, and then only when the defect cannot be cured by amendment of the original bill;¹ and when allowed, the former bill and subsequent proceedings need not be stated.

53. 2. *Bills of Revivor.*—When a party to an original bill dies or becomes incapable, by operation of law, of prosecuting or defending the suit, so that the suit abates (that is, stops), a bill of revivor is the ancient means to revive it and allow it to be prosecuted or defended by the personal representative of the deceased or disabled party. Formerly, this bill must tell the story of the original bill all over again, and then state the additional facts resulting in the abatement of the suit and the need of reviving it. But in later procedure this tedious-

¹ U. S. Eq. Rules, 57, 58.

ness is dispensed with. The bill need not now repeat the facts set forth in the original bill.¹

In code procedure a simpler practice obtains. The action is revived by a simple suggestion to the court, by affidavit or petition, of the facts showing the abatement; and the action is revived unless the opposite party shows cause to the contrary.

54. 3. Cross-bills. — Belonging to the class of bills not original is the cross-bill, — a kind of bill which the defendant files against a plaintiff. By his answer alone the defendant can only defend. He cannot “carry the war into Africa,” assuming the aggressive, and praying some affirmative relief. When he wishes to set up some right of his own against the plaintiff, or the other defendants, or both together, he may file a cross-bill setting forth his rights in connection with the subject-matter of the original bill, and pray for the affirmative relief to which the whole case, as he supposes, may entitle him.

So, too, the defendant sometimes files a cross-bill merely in aid of his defence, when to show the facts constituting his defence it is necessary to obtain discovery from the plaintiff of facts within his knowledge or documents within his control. As such discovery cannot be obtained by mere answer, the defendant must file a cross-bill to obtain it. Another instance is given where the cross-bill may be filed, on leave of court, viz.: when it serves the purpose of a plea *puis darreign continuance* to bring in matters of defence which have arisen since the replication was filed. In Federal equity practice leave to answer will be given; and resort to cross-bill to bring in defensive matter arising after issue joined would be a needless trouble.²

¹ U. S. Eq. Rules, 58.

² U. S. Eq. Rules, 60. As to Federal practice relating to cross-bills, see U. S. Eq. Rules, 72.

55. 4. *Bills of Review*. — Another bill of the class not original is the bill of review. This operates in equity procedure somewhat as the writ of error *coram nobis* operates in common-law courts. It is brought to have the decree of the court reviewed, altered, or reversed, — (a) for errors on the face of the record; (b) for newly discovered evidence.

56. 5. *Bills to impeach a decree* are of the kind not original. Where a decree has been obtained in equity by fraud and imposition, the party aggrieved may file his bill to impeach it, setting forth the fraud; and, if it be established, the court will impeach the original decree restoring the parties to their former status.

57. 6. *Bills to suspend a decree*, when subsequent matters have arisen making it inequitable to enforce it, and —

7. *Bills to enforce or carry into effect a decree* where by reason of subsequent events or by delay it cannot be executed without leave of the court, are of the class not original.

58. *The Frame of the Bill*. — In the infancy of Chancery practice the bill was a very simple, informal petition stating the facts. But as the jurisprudence of equity expanded, and the business of the court extended to more important subjects, there being but one Court of Chancery in England, its practice was confined to a few solicitors; and they, from interest, and in accordance with the technical spirit of the times, gave a formal and artificial cast to the pleadings. In time the bill became very formal. There was but one general form or frame to the bill, but it was elaborate and technical in a high degree. In the English Chancery pleading, as originally adopted in this country,

the bill contained nine parts, each having its set formulæ of introductory words and conclusions, and the whole was phrased in a very turgid and pathetic style of injured innocence. The parts were as follows:—

1. *The address of the bill.* In England the bill was addressed to the Lord Chancellor, or such other person as for the time held the great seal. In this country it is usually addressed to the judge or justices of the court in which the suit is brought, by their proper designation. In the United States Circuit Court it is: "To the Honorable, the Judge of the Circuit Court of the United States, within and for the — District of —." ¹

2. *The introductory part of the bill,* — that is, the part giving the names and addresses of the plaintiffs, and where necessary the capacity in which they sue, whether in their own behalf or in the right of another, as trustees, executors, etc., and the names and addresses of the defendants, and the capacity or relation in which they are sued. In the Federal courts it is necessary in the introductory part to allege the citizenship of the parties, in order to show that the court has jurisdiction by reason of the controversy arising between citizens of different States. The form, in substance, is thus: "A B, of [residence], and a citizen of the State of —, brings this, his bill, against C D, of [residence], and a citizen of the State of —, and E F, of [residence], and a citizen of the State of —. And thereupon your orator complains and says," etc.

3. *The premises or stating part of the bill,* which is a narrative of the plaintiff's case, or the facts on which his right to relief rests. He must set forth his right or title with certainty; also, the wrong or grievance of which he complains, and every material fact to which he intends to offer evidence, must be stated distinctly in this part of the

¹ U. S. Eq. Rules, 20.

bill. But it is unnecessary and bad pleading to state here the evidentiary facts, the circumstances that tend to prove the main statement or general charge. The names of the parties by whom the wrong is done, and against whom he seeks redress, must be given. This part is the real substance of the bill, and its sufficiency depends on what is herein alleged. The material facts should be alleged with precision. Most of the rules of the common-law system as to materiality, certainty, and for the avoidance of prolixity, obscurity, and confusion, should be observed in stating the case in equity.¹ Certainty to a common intent, however, is sufficient; and in construing a bill it will, if ambiguous to an exact equipoise, usually be taken most strongly against the pleader. Later in these pages the rules of pleading in equity will be more particularly commented upon in comparison with code rules and principles.

4. *The confederacy clause*, which charges that the defendant or defendants, with other persons unknown, but whose names, it is prayed, may, when discovered, be inserted in the bill and they made defendants, have confederated and combined together to defraud or deprive the plaintiff of his rights. This clause is now useless, unless there be an actual confederating; and the Federal rules in equity allow the plaintiff at his option to omit it,² which is usually done, unless it is essential to charge such combination with unknown parties.

5. *The charging part*. This is usually begun thus: "The plaintiff (or your orator) is informed and believes and charges," etc. It then sets forth the defences or excuses, which the plaintiff supposes the defendant will rely on to justify himself in the conduct of which the plaintiff complains. The bill, in the charging part, anticipates these defences, — in this respect departing from the common-

¹ Story v. Lord Windsor, 2 Atk. 632.

² U. S. Eq. Rules, 21.

law rule of pleading, and as has been quaintly said, "leaping before one comes to the stile"¹—and sets up other facts, and even evidentiary facts, which defeat or render nugatory such anticipated defensive matter of the defendant. The evidence is stated or charged when the plaintiff seeks discovery from the defendant, or admissions from him in his answer, respecting such evidentiary matter. But unless discovery is sought, only facts need be charged, and not evidence. The charging part was never indispensable.² In Federal practice it may be omitted, included in the stating part, or left out entirely.³

6. *The jurisdiction clause*, which avers that the "actings and doings and pretences of the defendant, alleged in the bill, are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of the plaintiff." The clause then continues: "In tender consideration whereof, and forasmuch as your orator is remediless according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable," etc. This clause was once deemed necessary; but it is mere assertion of a conclusion of law, and is now unnecessary. If the court has jurisdiction as shown by the stating part of the bill, this clause is needless. The bill must show it to be one of equity cognizance. If the court has not jurisdiction this clause is nugatory. The Federal Court rules dispense with it.⁴

7. *The interrogatory part* was once deemed necessary to require the defendant or defendants, either together or separately, to answer *on oath* the allegations of the bill. It was found that the defendant usually made his answer in too general terms. It became usual to add to the general

¹ Sir Ralph Bovy's Case, 1 Vent. 217

² Story's Eq. Pl. 9th ed. § 31; Langdell's Eq. Pl. § 55.

³ U. S. Eq. Rules, 21.

⁴ Id.

requirement that the defendant answer the matters in the bill a repetition, by way of interrogatories, of those matters on which full, explicit, unevasive answers are required. These inquiries are to "search the conscience" of the answering defendant. The interrogatories, when propounded, must refer to the matters in the bill; and if there is nothing in the prior part of the bill to warrant a particular interrogatory, the defendant is not obliged to answer it. The interrogatories enter into minute details, and are like questions or cross-questions put to an unwilling witness. The Federal rules somewhat change the structure of a bill in this respect.¹ The plaintiff who calls on the defendant for an answer on oath makes the defendant his witness and is bound by his answer, unless he can overcome it by the testimony of two witnesses, or one witness with corroborating circumstances. For this reason, the Federal rules in equity permit the answer *on oath* to be waived by plaintiff; and in such case defendant must answer, but his answer merely forms an issue.²

8. *The prayer for relief.* The plaintiff prays in his bill for the relief to which he supposes himself entitled on the case made out in the bill. This is called the *special* prayer. He then prays for general relief, usually in these words: "And the plaintiff (*or* your orator) prays for such further or other relief as the nature of the case may require, and as may be agreeable to equity and good conscience." Both prayers are generally inserted in the bill, — the special prayer first, the general following. The Federal rule³ is: "The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if any injunction or writ of *ne exeat regno*, or any special order pending the suit is required, it shall be asked for"⁴ in the bill. Relief may be prayed in the alternative.

¹ U. S. Eq. Rules, 40-44.

² Id. 41.

³ Id. 21.

⁴ Id.

9. *The prayer for process* concludes the bill. In this the plaintiff prays for process, viz., for a writ of subpoena to issue requiring the defendant to appear and answer the matter alleged, and abide the order or decree of the court. In Federal practice the prayer for process must contain the names of all the defendants named in the introductory part; and if any are infants or under guardianship the fact must be alleged. The general equity rule is that the prayer for relief and that for process must each contain the prayer for injunction or *ne exeat*, if asked;¹ but the United States rule does not require such repetition.²

Signature of counsel must be appended to every bill; as this is considered an affirmation on his part that upon the instruction given him, and the case laid before him, there is good ground for the suit in the manner in which the bill is framed.³

59. Pleadings of the Defendant : Demurrer to the Bill — The only pleading in equity to which there can be a demurrer is the plaintiff's bill. The defendant may demur generally or specially, though his general demurrer must point out the defects in the bill. This, however, is done in a general way. There are several points to be noted with respect to the demurrer in equity: (1) The demurrer may be to the whole or part of the bill. The defendant may demur to part, plead to part, answer to part, or demur to part and either answer or plead to the residue. And in Federal procedure if he demur to the whole bill, the demurrer is set down for argument.⁴ (2) The demurrer must point out the defects in the bill, especially when the

¹ Story's Eq. Pl. 9th ed. § 44, n.

² U. S. Eq. Rules, 23.

³ U. S. Eq. Rules, 24; Story's Eq. Pl. 9th ed. §§ 47, 48.

⁴ U. S. Eq. Rules, 32.

demurrer is special or to part of the bill only. (3) Defects not pointed out by the demurrer are not waived. (4) If the demurrer states no ground it will be overruled; but if it states some grounds it may be sustained on other grounds not specified, but which are urged on the argument; but the defendant cannot have costs in such a case.¹ The bringing new points against the bill is called demurring *ore tenus*. But there must be a demurrer on the record before demurrer *ore tenus* can be allowed.² (5) The demurrer does not, as at law, admit the facts except only for the sake of the argument, and, if overruled, the defendant is still allowed to plead or answer; and if he fail on the demurrer still the plaintiff must prove the facts alleged in his bill. (6) If the demurrer be sustained, the plaintiff may simply pay the costs of demurrer and have leave to amend his bill, if the facts of the case admit of amendment. There is no formal rejoinder in demurrer as in pleadings at law, in which the parties pray judgment of the pleadings as they stand; but the defendant in his demurrer prays judgment only whether he shall be compelled to answer. (7) By the Chancery rules it was dangerous to plead to part of a bill, or answer to it and demur to another part, for if the demurrer extended to any part or matters in the bill which was covered either by the plea or answer in form or substance, the demurrer was held to be overruled by the answer. So, if the demurrer failed to cover as much of the bill as it might have covered, it was bad. The doctrine was that the plea or answer and the demurrer must not overlap each other, nor must there be "gaps" between which the demurrer might cover.³ These rules have been modified both in English⁴ and American Federal

¹ Cooper Eq. Pl. 112; *Tourton v. Flower*, 3 P. Wms. 370.

² Story's Eq. Pl. § 464; *Cartwright v. Green*, 8 Ves. 409.

³ Mitf. Eq. Pl. 4th ed. 209, 210, 319, 320.

⁴ Eng. Chan. Ord. 37; Cr. & Phill. 379.

practice;¹ and for these faults the plea is not now overruled.

60. Grounds of Demurrer to Bills. — Demurrers, as has been said, may be to the whole bill or to part of it. Those to the whole bill are usually demurrers to the relief.

61. I. Demurrers to Relief. — These are divided into demurrers: (1) *To the jurisdiction*, — (a) that the subject is not cognizable by any municipal court of justice; (b) that it is not within the jurisdiction of equity; (c) that some other court of equity has jurisdiction of the subject-matter, or (d) that some other court possesses the proper jurisdiction. In Federal practice, the want of jurisdiction must be objected to by demurrer or plea.² (2) *To the person*, — (a) that the plaintiff is not entitled to sue, by reason of some personal disability, such as that he is an infant and does not sue by guardian, or a married woman and does not sue by next friend, or an insane person or idiot and does not sue by committee, and the disability appears upon the face of the bill; or (b) that the plaintiff has no title in the character in which he sues; (d) Alienage, bankruptcy, attainder, outlawry, and conviction of felony were disabilities to sue and grounds of demurrer to the person, in old English practice. (3) *To the substance of the bill*. These are — (a) that the value in controversy is beneath the dignity of the court; (b) that the plaintiff has no interest in the subject-matter of the suit, nor proper title to institute proceedings; (c) that the bill does not show any equity in the plaintiff to the relief prayed for; (d) that, though the plaintiff has an interest in the suit or title in the subject-

¹ U. S. Eq. Rules, 36, 37, Jan. Term. 1842.

² *De Sobry v. Nicholson*, 3 Wall. 420; *Bingham v. Cabot*, 3 Dall. 382; *Jackson v. Ashton*, 8 Pet. 148.

matter, yet that he has no right to call upon the defendant to answer his demand; (e) that there is want of interest of the defendant in the subject-matter; (f) that the bill is to enforce a penalty or forfeiture, which courts of equity never lend their aid to enforce, but leave the parties to their remedies at law. (4) *To the frame and form of the bill.* Objections to the frame and form of the bill are a class of demurrers to relief. They are (a) defects of form for uncertainty in the allegations, looseness or in-artificial method in the structure, or the omission of prescribed formulæ, or that the bill is brought contrary to the usual course of the court. (b) Multifariousness; of this objection more will be said in proper connection later on;¹ (c) *Defect or want of parties*, and misjoinder of parties, appearing on the face of the bill.² For misjoinder of plaintiffs all the defendants may demur. If the misjoinder is of defendants, only those who are improperly joined can demur.

62. II. *Demurrer to Discovery.*—As has been noted, the plaintiff may in some cases be entitled only to discovery, and not to relief. In others, he may be entitled both to discovery and relief. When the bill shows the plaintiff entitled to discovery only, and he goes on to pray relief, the whole bill, in England, would be demurrable. In America the demurrer would be good as to the relief; but the plaintiff would still be entitled to discovery. But the defendant cannot demur to discovery alone when the discovery is merely incidental to the relief. When the bill is properly for discovery *and relief*, there may be appearing on the face of the bill grounds for demurrer, when it is apparent from the bill (1) that the discovery or answer to the bill may subject the defendant to a

¹ *Post*, p. 220.

² *Cockburn v. Thompson*, 16 Vesey, 325; *Penny v. Watts*, 2 Phil. 142

penalty or forfeiture, or compel him to criminate himself; (2) that it is immaterial to the purposes of the suit; (3) that it would involve the breach of some confidence which the policy of the law privileges from disclosure; (4) that the matter sought to be discovered, appertains to the title of the defendant, and not to that of the plaintiff; (5) that the defendant is a *bona fide* purchaser for value without notice. Many objections that are grounds for demurrer to a bill for relief apply with equal force to bills for discovery, viz.: (1) that the subject is not cognizable in any municipal court; (2) that the plaintiff is not entitled to discovery by reason of some personal disability; (3) that the plaintiff has no title in the character in which he sues; (4) that the value involved in the suit is beneath the dignity of the court; (5) that the plaintiff has no interest in the subject-matter of the suit, nor proper title to institute a suit concerning it; (6) that, though he has such title and interest, he has no right to call on the defendant to answer his demand; (7) that the defendant has no interest in the subject-matter of the suit which entitles the plaintiff to institute suit against him; (8) that the object of the bill is to enforce a penalty or forfeiture.

Considering these as applied to bills of discovery only, there are the following grounds of demurrer: (1) Demurrer lies to discovery when the case made by the bill is one of which equity does not assume jurisdiction. A court of equity will not assume jurisdiction (a) to aid by discovery in a mandamus, *quo warranto*, prohibition, or indictment, or of any other proceeding of a criminal nature, nor (b) in respect to civil rights unless they are in controversy, or to be litigated in courts; nor (c) in civil matters in another court which itself can compel discovery; nor (d) to support an action that is itself against public policy. (2) Demurrer lies to a bill of discovery when it is brought in aid of an action in another court, which action cannot be

maintained. If the bill shows that the action could not be maintained at law, demurrer lies to the bill; but not where the right of action is doubtful. The discovery must be material to the action in aid of which it is brought. (3) Demurrer lies to bill of discovery when the bill is brought by or against persons who are not parties to the action at law. (4) Another ground of demurrer to discovery is that the defendant has no interest in the controversy, and is a mere witness. (5) Another is that, though both plaintiff and defendant have an interest, yet that there is no privity of title between them that will give the plaintiff a right to discovery against the defendant. (6) A sixth ground is, the plaintiff seeks discovery, not in aid of his own title nor necessary thereto, but to pry into the title of his adversary. As to this, the doctrine is summed up thus: (*a*) the plaintiff in equity can exact discovery as to all matters of fact well pleaded that are about to come on for trial; but (*b*) his right does not extend to a discovery of the matter in which the case of the defendant is to be exclusively established, or to evidence which relates exclusively to the defendant's case. (7) That the discovery *may* subject the defendant to a penalty or forfeiture, or compel him to criminate himself. The doctrine is not confined to cases where the direct tendency of the discovery is to so expose the defendant; but it goes to the extent of protecting him from answering any question which may form a link in the chain by which such a case could be established against him. So, where the plaintiff seeks discovery of matters which might subject the defendant to criminal prosecution, and also other matters, he must so separate them from each other that discovery can be made of the one without involving the other. It is now generally held that where the bill charges fraud, involving the basest moral turpitude which does not amount to a public offence, the defendant is bound to make

discovery. And when the liability to penalty or forfeiture has ceased by lapse of time, death of party, or repeal of act, the objection to discovery cannot be raised by demurrer, as the ground of it no longer exists; (8) that the bill seeks discovery from one whose knowledge of the facts was derived from the confidence reposed in him as counsel, attorney, solicitor, or arbitrator, or in some other professional character where the law holds the communication to be privileged; (9) that the defendant has an equal equity with the plaintiff, and therefore is entitled to be protected from discovery, which will endanger or destroy his present rights.

In all these cases the objection must appear on the face of the bill. If it does not so appear, the objection must be taken (as later explained) by plea.

63. *Demurrers to Bills not Original.*—The causes of demurrer which apply to original bills apply in many cases to bills not original. (1) *A demurrer to a supplemental bill*, or bill in the nature of a supplemental bill, may be filed whenever it appears on the face of the bill, (a) that the plaintiff has no right to file that kind of a bill, or (b) that the bill is not properly supplemental, and that it makes a new and different case from the original bill, upon new matter. (2) *Demurrers to bills of revivor*, or those in the nature of bills of revivor, may be filed, (a) for want of privity, — that is, that the one filing the bill is not the proper person to file a bill of revivor; (b) for want of sufficient interest in the party seeking to revive; or (c) for some imperfection in the frame of the bill. (3) *Demurrers to bills in the nature of bills of revivor and supplement* may be filed in the same cases that original bills might be exposed to demurrer. (4) *Demurrers to cross-bills* lie in cases where demurrer lies to original bills, except, it is said, that the demurrer for want of equity will not lie to

the cross-bill. Unless the cross-bill seeks equitable relief, and is confined to matters in litigation in the original suit, it is open to demurrer. So it will be demurrable, if it is filed contrary to the practice of the court, as in cases where it is filed after the publication of the testimony in the original suit, and seeks to take new testimony, or where it seeks to bring in question facts that are admitted in the answer. (5) *Demurrers to bills of review and bills in the nature of review.* The bill of review is founded upon some error upon the face of the record. If the bill of review (a) go into the evidence at large not stated in the decree, or (b) if the supposed error is one by which the person who brings the bill of review is not aggrieved, or (c) when the time has expired in which the bill of review may be brought, or (d) if the bill is not brought according to the course of the court, or (e) is not proper in its form and structure, demurrer lies. (6) *Demurrer to bill to impeach a decree* for fraud is sustainable, (a) when the circumstances stated do not amount to fraud; (b) when it is alleged that those whose rights are affected were not before the court, and it appears on the bill that sufficient parties were before the court to bind them all. (7) *Demurrer to bill to suspend a decree*, or avoid its operation, are very rare; and there is but little in precedent regarding demurrers to them. Such a bill would be demurrable if (a) it failed to state a case for suspension of the decree, or (b) the party filing the bill was not entitled to the suspension, etc. (8) *Demurrers to bills to carry a decree into execution* are proper in a few cases peculiar to themselves, viz.: (a) where the plaintiff has no right to the benefit of the decree; (b) where the case made by the bill shows the decree to be clearly erroneous.

The following is a sample form of a demurrer in equity.

FORM OF DEMURRER TO BILL.

Title of Cause. }

The demurrer of C D, defendant, to the bill of complaint of A B, the above-named plaintiff.

This defendant, by protestation, not confessing any or all the matters and things in the plaintiff's said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer sheweth, that [*here set forth the grounds of demurrer, and conclude*] :

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly prays the judgment of this court whether he shall be compelled to make any further or other answer to the said bill ; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

Of Counsel for Defendant.

CERTIFICATE OF COUNSEL.

I hereby certify that I am solicitor and of counsel for the defendant in the above entitled cause, and that in my opinion the foregoing demurrer of C D, defendant, to the bill of complaint herein, is well founded in point of law.

Solicitor and of Counsel for Defendant.

OATH BY DEFENDANT.

United States of America, }
District of ———. } ss.

C D being duly sworn, on oath, says that he is defendant in the above-entitled cause, and that the foregoing demurrer is not interposed to delay the said cause or any proceedings therein.

C D.

Subscribed and sworn to before me }
this ——— day of ———, A. D. 18 — . }
Commissioner.

64. The Disclaimer.—When the bill is for relief, and it happens that the defendant has no interest or title, where he is alleged to have one, or it is made the basis of a liability, but he has none, he may disclaim all interest. But his disclaimer of interest does not always relieve him from answering. Generally, it must be accompanied by answer. The defendant may disclaim and answer, or he may demur to part, plead to part, answer to part, and disclaim to another part of the bill. The disclaimer is in form a pleading, in which the defendant simply disclaims all right, title, and interest to or in the matter in demand. It cannot be used to avoid liability nor discovery. If the defendant once had an interest, but has parted with it, the fact must be shown by answer auxiliary to the disclaimer.

The following is —

THE FORM OF DISCLAIMER.

Title of Cause. }

The disclaimer of C D, defendant, to the bill of complaint filed against him by A B, plaintiff above-named.

The said defendant, C D, comes and disclaims all manner of interest or concern in the matters alleged in said bill of complaint, and prays to be hence dismissed with his costs.

Solicitor.

65. Pleas in Equity.—As has been stated, the demurrer lies when the objection to the bill is apparent on its face. When the objection does not appear on the face of the bill, the defendant must raise it in some other manner. Sometimes he may do it by plea, sometimes by answer only, and in some cases, at his option, by plea or answer. A *plea* may be defined to be a special answer setting up and relying upon one or more things as a cause why the suit should be either dismissed, delayed, or

barred. This is interposed, in a proper case, to protect the defendant from answering the matters or interrogatories of the bill, and demands the judgment of the court in the first instance, whether the special matter pleaded does not debar the plaintiff of the right to answer which his bill has made apparent. Its office is, generally, to decide the case upon some single, decisive point, and avoid the expense of answer, examination of witnesses, etc. The rule obtains in equity, as it formerly did at law, that pleas must be single unless the court allows a double plea.

66. *Classes of Pleas.* — Pleas in equity are of two general classes, viz.: *pure pleas*, and *pleas not pure*, of which are *anomalous pleas*. A *pure plea* is one that sets up new matters, *dehors* the bill, affirmatively alleged, the effect of which is to end the controversy by dismissing, delaying, or barring the suit. The requisites of a pure plea may be summarized as follows: (1) In pleas in equity there must, in substance at least, be the same strictness as in pleas at law. (2) The plea must follow the bill, not evade it, nor mistake its object. If it do not go to the whole bill, it must clearly express what part it does go to. This must be done with precision. When parts of the bill are pleaded to, part demurred to or disclaimed, and part answered, the boundaries of the matter pleaded to must be clearly defined, for, if the plea covers the same ground that the answer does, the answer, by the old rule, "overrules the plea." Such is not the effect, however, in the Federal courts, as the rigor of this rule is mitigated by the court rule that no plea shall be held bad and overruled only because the answer of the defendant may extend to some part of the same matter as may be covered by the plea.¹ (3) Another requisite

¹ U. S. Eq. Rules, 37.

of the pure plea is that it must be founded on new matter, not apparent on the face of the bill. This is qualified, however. The purely negative plea may simply deny facts alleged in the bill. (4) It must reduce the cause to a single point, such as is issuable, and material to dismiss, delay, or bar the bill. (5) It must be direct and positive, not stating facts inferentially or by way of argument. But matters not within the positive knowledge of the defendant may be alleged upon information and belief. (6) It must clearly and distinctly aver all the facts necessary to make the plea a complete equitable defence to so much of the bill as the plea extends to. As at law, if there be ambiguity in the plea, it is taken most strongly against the pleader.

67. Pleas not Pure. — While the pure plea puts forward matter of defence altogether *dehors* the bill, the plea not pure relies mainly upon matter stated in the bill, and negatives matters of fact stated therein. If the denials go to matters so material that, if true, they constitute a defence, the plea is a good plea. Where it goes to the foundation of the suit and to the title of the plaintiff, this is the *negative* plea.

Another class of pleas not pure is that of the *anomalous plea*. This relies wholly upon matters stated in the bill, and negatives such as are material to the rights of the plaintiff; and, further, this plea requires an answer to support it. This plea is applicable where the plaintiff in his bill has anticipated the plea, and not admitting it has replied to it in his bill, as he may do in the charging part. The defendant then, if he wishes to rely upon such defence, must traverse the anticipatory matters. He therefore combines with his affirmative plea a negative rejoinder. His plea is partly affirmative and partly negative, partly setting up the new matter and partly destroying the

allegations of the plaintiff's bill. The anomalous plea leaves each of the parties something to prove, — the defendant his affirmative defence; the plaintiff his affirmative replication set forth in his bill anticipatory to the plea. As to the latter, the plaintiff is entitled to discovery, and hence the anomalous plea must be supported by answer. As to the anomalous plea, it may be laid down: (1) That when the bill admits facts to exist that constitute the defendant's defence, and then states facts and circumstances to avoid such defence, the plea, and also the answer, should contain averments which negative the facts and circumstances alleged in the bill. (2) The answer which supports the plea need not be put in, unless there are specific facts alleged in the bill, to which the answer is a response. (3) The answer must not extend beyond the facts and circumstances necessary to be discovered in support of the plea, if the plea is coupled with an answer to any part of the bill not covered by the plea, and which, by the plea, the defendant declines to answer, for the plea will be overruled by the answer. So, if the defendant answer in support of his plea, when no answer is necessary to its support, the answer overrules the plea. The reason of this rule is that the pleas are put in as reasons why the defendant should not answer; but, if he answer, he waives the plea. This is the technical rule that formerly obtained and made it dangerous to combine a plea and answer, as any overlapping spoiled the plea. The rules of court heretofore cited have removed this danger¹ by providing that no plea shall be held bad, because the answer may extend to some part of the same matter as may be covered by the plea, nor because the plea does not cover so much of the bill as it might have extended to. By another rule in Federal practice, when the bill especially charges fraud

¹ U. S. Eq. Rules, 36, 37.

or combination, a plea to such part must be accompanied by an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.¹

The plea, like the demurrer, must be certified by counsel for defendant, that in his opinion it is well founded in point of law; and the defendant must make oath that it is true in point of fact.²

68. Kinds of Pleas.—Having considered pleas with reference to their general classes, it remains to mention the different sorts of pleas. They may, like demurrers, be either to relief or discovery. Pleas to relief are:

1. *To the jurisdiction.* These simply allege that the Court of Chancery is not the proper court to take cognizance of the suit. But the plea does not dispute the rights of the plaintiff. Like the demurrer, which may be interposed for want of jurisdiction,³ the plea to the jurisdiction may be, (a) that the subject-matter of the bill is not within the cognizance of any municipal court of justice; (b) that it is not within the jurisdiction of a court of equity; (c) that it belongs to some other court of equity; (d) or, generally, that some other court possesses the jurisdiction.

2. *Pleas to the person*, which are of two kinds, viz., to the person of the plaintiff and to the person of the defendant. Formerly, (a) *outlawry*, (b) *attainder*, (c) *alienage*, etc., could be pleaded to the person of the plaintiff; (d) *infancy*, (e) *coverture*, (f) *bankruptcy*, (g) *insolvency* (when they disable a party from suing), (h) *want of character to sue*, can be pleaded. Instances of this are when the plaintiff sues as administrator when he is not administrator, or trustee when he is not a trustee, or, heir, partner, or is a fictitious person or dead. These

¹ U. S. Eq. Rules, 32.

² Id. 31.

³ *Ante*, p. 72.

pleas are in the nature of pleas in abatement at law. Pleas to the person of the defendant are such as that, (a) he is not the person he is alleged to be, or (b) does not bear the character he is alleged to bear in the bill, or (c) that he was bankrupt before the suit was brought, and his assignee ought to be the defendant, as all his interest has passed to the assignee.

3. *Pleas to the frame of the bill*, which object to the bill as framed. They bear some analogy to the plea at law in abatement of the writ. These pleas are—(a) that another suit is pending in a court of equity for the same matter; (b) that there is want of proper parties; (c) that the bill leads to multiplicity of suits; that the plaintiff has split his demand, or so framed his bill as to render other suits necessary; (d) that the plaintiff has joined and confounded in his bill several distinct matters, which is called multifariousness, and this fault does not appear on the face of the bill; so that objection cannot be taken by demurrer.

4. *Pleas in bar*. These, like pleas in bar at law, go to defeat the right of suit. They rank under three general heads: (1) Pleas resting on a bar created by some statute, as,—(a) the Statute of Limitations; (b) the Statute of Frauds; or (c) some particular statute creating a bar; or (d) a statute fine and non-claim, not in use in America. (2) Pleas of matter of record, such as a common recovery, a judgment at law in a court of record, or some court of competent jurisdiction, or a decree in equity between the same parties for the same cause. The exception to the rule that these can be pleaded in bar is that when the bill charges that the judgment was obtained by fraud, and makes that the ground for relief, the judgment cannot be pleaded as a pure plea; but the fraud must be denied and the plea supported by answer. (3) Pleas of matter *in pais*, principal of which are: (a) the plea of release, that

the plaintiff has released his cause of suit; (*b*) plea of stated account, — that is, that the accounts have been examined, and the balance admitted, without being paid; this may be pleaded in bar when the bill is filed for an accounting; (*c*) the plea of a settled account, that the account has been settled. Equity will not open a settled account except for errors or fraud, which must be specifically pointed out in the bill. When so pointed out, the plea in bar must be supported by answer denying the error or fraud; (*d*) plea of an award, that the matters in the bill have been submitted to arbitrament and award. This plea must be supported by answer that the arbitrators were incorrupt and impartial; (*e*) plea of purchase for a valuable consideration, without notice of the plaintiff's title. In Federal procedure this may be set up by answer instead of plea;¹ and the defendant is not compelled to make any further answer or discovery of his own title than would be required in any answer in support of such plea; (*f*) plea of title in the defendant, — that is, that he is the owner of the premises claimed by the defendant. This plea is generally founded on a will or a conveyance, or long, peaceable, adverse possession. This is often embraced in a plea of the Statute of Limitations, but is often good as a defence in equity when not within the statute, or, as the phrase is, when the "statute has not run" or does not apply. Equity does not favor stale claims, nor parties who have long slept upon their rights.

69. Pleas to Discovery. — Pleas to bills of discovery, which seek no relief, are nearly the same as those which have been mentioned. When demurrer to discovery would lie if the matters appear on the face of the bill, the plea can be pleaded when such matters do not so appear

¹ U. S. Eq. Rules, 39.

Such pleas are—(a) to the jurisdiction, of which sufficient has already been explained; (b) to the person, as in case of pleas to relief, already classified; (c) to the frame of the bill; and (d) pleas in bar. Pleas in bar of discovery most peculiarly appropriate are—(1) that the discovery may subject the defendant to pains and penalties, or (2) to forfeiture, or (3) that it will betray professional confidence, or (4) that defendant is a purchaser for valuable consideration without notice.

70. Pleas to Bills not Original.—Under this head it may briefly be noted that pleas may be made to bills not original: (1) To supplemental bills, and those in the nature of supplemental bills, where demurrer would lie if the objection appeared on the face of the bill, the objection may be urged by plea, if it do not so appear. Where a supplemental bill is filed to bring in matter that might have been brought in by amendment of the bill, this is ground for plea when demurrer cannot lie. (2) To bills of revivor it may be pleaded (a) that the plaintiff is not entitled to revive, or (b) that proper parties are wanting, or (c) that the bill is filed too late. (3) To cross-bills, generally, all the pleas may be pleaded that original bills are liable to. (4) To bill of review, or bills in the nature of such bills, there may be pleas. When the review is sought on newly discovered evidence, any plea may be made which would have avoided its effect if in the original bill. (5) To bills to impeach a decree for fraud, there may be pleas of the decree denying the fraud, supported by an answer meeting the charges of fraud. (6) To bills to carry decrees into execution, there may be pleas that the plaintiff has no right or interest in the decree, etc.

71. Sufficiency of Pleas, how decided.—The plaintiff may take issue with the plea by filing replication, or,

if he deem it insufficient or (as is said in common-law courts) demurrable, he merely "sets it down for argument;" that is, he has it placed upon the proper calendar to be brought on for argument at the next sitting of the court.¹ If the plea is found bad it is overruled, and the defendant must pay costs up to that period, unless the court otherwise direct, and must answer the bill within such time as the court assigns.²

The following illustrates the forms of pleas to a bill in equity:—

FORMS OF PLEAS TO BILLS.

Title of Cause. }

The plea of C D and E F, defendants to the bill of complaint of A B, plaintiff (or, the joint and several plea of C D and E F, defendants, to, etc.).

These defendants, by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth, for plea to the whole of the said bill, or to so much and such parts of the said bill as prays [*here specify the part of the prayer to which the plea is directed*] say: [*here set forth the matter of the plea, as, for example*] That previously to the filing of said bill of complaint, and after the said pretended claim therein, and on the — day of —, A. D. 18—, the said plaintiff did execute, under his hand and seal, and deliver to these defendants, a certain deed of release wherein and whereby he forever released and discharged them and each of them of and from all claims, demands, causes of action existing in his favor against them or either of them, from the beginning of the world unto the said day, and particularly and especially of and from the claim and demand set forth in said bill. [*Then conclude*] Therefore, these defendants plead the said release in bar to the whole of said bill of complaint, and humbly pray the judgment of this honorable court whether they

¹ U. S. Eq. Rules, 33.

² Id. 34.

ought to be compelled to make any further answer to the said bill, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

Solicitor.

Of Counsel.

NOTE. — In Federal practice there must be added to the certificate of counsel and affidavit of verification as follows:—

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for the defendants, C D and E F, in the above-entitled cause, and that in my opinion the foregoing plea is well founded in point of law.

Of Counsel for Defendants.

OATH BY DEFENDANTS.

United States of America, } ss.
District of ____.

C D and E F being duly sworn, on oath each for himself says that they are the defendants named in the foregoing plea; that he has read the same and knows the contents thereof, and that the same is true, to his own knowledge.

C D.
E F.

Subscribed and sworn to before me, }
this ____ day of ____, A. D. 18__.

J B. Commissioner.

72. The Answer to the Bill. — If the defendant do not demur or plead to the bill, he must answer. The answer in Chancery means two things: (1) The answering the matters which he is called upon by the bill to answer or make discovery upon. He must give all the information he is able to give, as evidence for the plaintiff, or to aid the plaintiff in establishing his case. He must answer

fully. When the bill contains interrogatories, he must answer them fully and categorically, unless they are such as he is not required to answer. (2) Defensively meeting the charges of the bill. The object of the answer is to nullify the case made by the bill. Hence it cannot set up matters that are independent of the bill and not operative upon it.

73. The Form and Frame of the Answer. — The answer is a formal writing setting forth such matters as the bill of the plaintiff makes necessary. It usually consists of four parts: (1) The title of the cause, indicating the name of the court and the parties,¹ and the heading, indicating what the paper is. (2) The "preliminary saving," in which the defendant reserves to himself all rights of exception.² (3) The third part is usually the examination part, in which the defendant states at large all the matters, facts, and circumstances concerning which he is to make answer. Connected with this, though not always in this part of the answer, the answers to interrogatories propounded in the bill come in. (4) The defensive matters.

¹ FORM OF COMMENCEMENT OF ANSWER.

In the Circuit Court of the United States, for the — District of —, in equity.

A B, Plaintiff, }
 vs. }
C D, Defendant. }

The answer of C D, defendant, to the bill of complaint of A B, plaintiff.

² FORM OF "PRELIMINARY SAVING."

This defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which may be had or taken to the manifold errors, uncertainties, and other imperfections in the plaintiff's said bill of complaint for answer thereto, or unto so much and such parts thereof as this defendant is advised is or are material to be answered unto, this defendant for answering says, etc.

Without attempting any elaborate treatment of the subject, the following general principles may be summarized as to answers:—

RULES CONCERNING ANSWERS.

(1) The defendant need not answer where he would be privileged from answering as a witness, — as, where his answer would tend to subject him to a criminal prosecution, or would be the disclosure of a privileged communication. (2) The defendant need not answer immaterial matters; that is, such as will not furnish evidence material to the plaintiff's case. (3) When the bill calls on the defendant to render an account, he must, as a general rule, render it; but if he shows an affirmative defence, or facts that defeat the equity, or show that the plaintiff is not entitled to an accounting, he need not give so full an account in such cases as in others; as an accounting is generally required after the court has determined that the plaintiff is entitled to it, and is ordered by interlocutory decree. (4) It is an ancient rule that the defendant who submits to answer must answer fully. The rule is modified in Federal practice, (a) by allowing defendant to decline answering where he might have protected himself from answering by demurrer;¹ or (b) where he might have protected himself by plea;² and (c) he may set forth in his answer matters of defence in bar of or to the merits (but not mere matters in abatement, or objections to the character of parties or to form) which he might have availed himself of by plea in bar; and where such matters pleadable in bar are set up in the answer, he is not compellable to answer or discover any further than he would have been in an answer in support of such plea.³ (5) When the bill contains a charge that the defendant

¹ U. S. Eq. Rules, 44.

² Id. 39.

³ Id. 39.

has documents in his possession of which discovery is sought, the defendant may deny, if he can, that he has the documents; if not, he must admit them and specify the contents so fully as to show whether they have or have not a bearing on the case. (6) The answer is generally called for under oath. It then becomes evidence; and as it sometimes so fully meets the plaintiff's case, it is often hazardous for him to call for an answer under oath, since it requires two witnesses, or one witness with corroborating circumstances, to overcome the effect of the answer.¹ Hence, it is allowed in Federal practice to waive the oath as to the answer altogether, or as to part of the interrogatories propounded in it.² (7) When interrogatories are propounded in the bill, they must be answered fully (except as indicated in the preceding paragraph), and under oath unless oath be waived. The form of the answer varies with the questions.³ (8) The answer must be certain and positive.⁴ If the fact is within the knowledge of the defendant he must answer. He is required to answer according to the best of his knowledge, information, and belief. He must do so positively, if the matters happened within six years; if otherwise, he may answer upon remembrance and belief, if he have any.⁵ As to matters of which he has no knowledge or information, he may answer that as to them he is a stranger, totally ignorant, and unable to answer. The answer must state facts, not inferences, and must not be argumentative.⁶

¹ Story on Eq. Pl. 9th ed. § 849 a.

² U. S. Eq. Rule, 41.

³ The introductory words are usually: "To the first interrogatory in said bill, which is as follows: [*here quote it*], this defendant answering says: [*here give answer*]."

⁴ *Devereaux v. Cooper*, 11 Vt. 103.

⁵ *Bolton v. Gardner*, 3 Paige, 273; *Brooks v. Byam*, 1 Story, C. C. 296; *Cary v. Jones*, 8 Ga. 516.

⁶ *Bank v. Lewis*, 8 Pick. 113, 119; *Robertson v. Bingley*, 1 McCord, Ch. (S. C.) 333.

(9) The defendant in his answer usually expressly admits such facts as he does not deny. The rule in equity is different from that at law, by which a party admits all that he does not traverse by denial. So, in answering the allegations of the bill, the defendant admits some and denies others. When he denies an allegation he must do so explicitly, reserving his explanation or qualification of his denial to the defensive part of his answer. Qualified denials are usually given thus: "Saving as herein appears, it is not the fact that," or "the defendant denies that," etc. When the bill interrogates as to particular circumstances, the defendant must answer as to them, and a general denial is not sufficient;¹ but to a general allegation a general denial is sufficient.² The defendant need not deny nor answer immaterial matter.³

73 a. Scandal or Impertinence in Pleadings in Equity.—Impertinence in a pleading is a species of irrelevant, redundant matter, not germane to the matters or cause of suit in the bill. It is moral impertinence, when it unnecessarily imputes evil motives to any party or person, such as spite, unfairness, selfishness, etc. It is scandalous when it unnecessarily charges some party to the suit with some crime or immorality, such conduct being no part of the case made by the bill or answer. No charge, however, is scandalous when it is necessary to be made to set out the case or defence. The answer may be impertinent in setting out *hæc verba* that which is not proper, thus "stuffing" the pleadings, or in putting in that which is mere unnecessary recital, or is contrary to

¹ *High v. Batte*, 10 Yerger (18 Tenn.), 335; *Robinson v. Woodgate*, 3 Edw. Ch. 422; *Patrick v. Blackwell*, 21 Eng. L. & Eq. 48.

² *Cowles v. Carter*, 4 Ired. Eq. (N.C.) 105.

³ *Utica Ins. Bank v. Lynch*, 3 Paige, 210; *Butler v. Catling*, 1 Root, 310.

good manners. Matter that is impertinent or scandalous will be expunged, at the cost of the pleader guilty of it.¹ Exceptions are taken, and it is referred to a master to report whether the matter be scandalous or not.

74. Exceptions to Answers.—The plaintiff does not demur to an answer, as at law. He raises the question as to its sufficiency—whether as discovery or defence—by filing exceptions to it. An exception is a formal objection, in writing, that the answer is insufficient. It may be in the form below, substantially.² If no exceptions are filed the answer is taken as sufficient. Being filed, the defendant must file an amended answer before the next rule day, or the plaintiff, on his failure to do so, “sets the exceptions down for hearing.” It is on the proper day heard by the master or the court,³ and if the answer is found insufficient, the defendant is ordered to put in a full and complete answer; and if that be insufficient the plaintiff may except again. In old English practice a defendant who had put in four insufficient answers

¹ U. S. Eq. Rules, 26.

² *Title of Cause.* }

Exceptions taken by A B, the plaintiff herein, to the answer of C D, the defendant.

1. That said defendant has not, to the best of his knowledge, remembrance, information, and belief, answered and set forth [*here state what the point is as to which the answer is insufficient*].

2. That the defendant has not answered [*here state the further points of insufficiency, and state each one separately*].

In all which particulars the plaintiff excepts to said answer as evasive, impertinent, and insufficient, and prays that the said defendant be compelled to put in a full and sufficient answer to said bill of complaint.

— — —
Plaintiff's Solicitor.

³ In English practice by the master; in Federal practice by the judge. U. S. Eq. Rules, 26.

was committed to prison. In Federal procedure, here, the plaintiff may have writ of attachment to arrest the defendant and have him held in custody until he properly answers.¹ The rule as to exceptions is that they must specifically point out the defect, and not be filed upon mere "surmise of insufficiency in general."² The prevailing party on the hearing of exceptions to an answer recovers costs.

75. The Replication.—In early practice, the plaintiff could specially reply to the plea or answer of the defendant. But in later English and in American practice, the serial pleadings are dispensed with. But the plaintiff must file a "general replication," within the prescribed period, or such time as the court permits beyond it, or his bill is liable to be dismissed. The general replication is a formal joinder of issue, usually in the form of needless verbiage below.³ The meaning of this jargon is that the plaintiff

¹ U. S. Eq. Rules, 64.

² Lord Bacon's Ordinances, 52.

³ FORM OF GENERAL REPLICATION.

Title of Cause. }

The replication of A B, plaintiff to the answer (or plea) of C D, defendant.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the plea (or answer) of the said defendant, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in law, and that the answer is uncertain, evasive, and insufficient in law to be replied unto by this repliant, without this, that any other matter or thing in the said plea (or answer) contained, material or effectual in law to be replied unto, and herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

traverses the matters in the plea or answer. This is the last stage of pleading in Chancery. The next step is the taking of testimony.

SECTION V.

THE CIVIL-LAW SYSTEM OF PLEADING.

76. Pleading "by Allegation." — Of this system it need only be explained here that it proceeds upon very different principles from the common-law pleadings, and is unlike our equity system. Its peculiar features consist (1) in breaking the pleadings up into a number of separate paragraphs, called "allegations," each of which contains a single important circumstance or principal fact toward constituting the cause of action; (2) the statement in each allegation of all the minute subordinate facts which make up the evidence of the main circumstances relied upon to sustain the cause of action. The pleading (the complaint being called a libel) thus constructed contains — (1) the material or issuable facts, as the leading or principal allegations; and (2) a narrative of the probative or evidentiary facts from which the existence of the issuable facts may be inferred. It discloses the whole case of the complainant, giving a complete account of the transaction, describing the situation of the parties at each stage, all the incidents out of which the cause of action arises, its final conclusion and results, and (3) a prayer for such relief as the complainant or libellant supposes himself entitled to upon the facts stated.

In some of the code States one feature of this system has been borrowed, viz.: the separation of the pleading into distinct paragraphs, continuously numbered, each con-

taining a statement of a single material, issuable fact.¹ The other feature of this system of pleading, the giving of probative matter, violates the essential, fundamental principle of the code system, — that material facts, not matters of evidence, must be pleaded.

SECTION VI.

OF CODE PLEADING.

77. The Adoption of the Reformed Procedure. — The principles and forms of pleading, of which an outline has been given in the preceding pages, were brought to the American colonies of English planting as a part of the common law. Although but few of the colonies or States afterwards admitted into the Union erected separate courts of Chancery, yet all recognized the distinction between primary legal and primary equitable rights, inherent in English jurisprudence, and between the powers and jurisdiction of common-law courts and those of Chancery. While in establishing their judiciaries they delegated to the same judges both legal and equitable jurisdiction, no attempt was made to blend the two systems into one, to abrogate the distinction between legal and equitable rights, and fuse the two into one comprehensive system. And for more than half a century after the formation of the Union, there was no attempt, except in one or two States, to unite into one the two systems of procedure. The same courts, save in a few States, were given jurisdiction in law and equity. But in actions at law the judges sat as a common-law court. The pleadings and proceedings were conducted in the main according to the established

¹ Code Ref. 108, 122, 123.

practice in the English courts of law. In cases of Chancery cognizance the judges — putting off their common-law judicial functions — sat as courts of equity; and the pleadings and procedure, with slight modifications, followed those of the English High Court of Chancery. There was some effort to simplify the procedure. It extended, however, but little farther than the abolition of the distinction between actions of trespass and trespass on the case, and the permitting of a plea of the general issue, coupled with notice or statement of special matters (which in regular practice would be ground for a special plea in bar), to be offered in evidence under it. In some States there was a dispensing with formal commencements and conclusions, protestations, special traverses, and other subtle niceties of the ancient system.¹ The incongruities and in some instances the conflict of the two jurisdictions gave rise to much criticism. The duplex systems of remedial justice subjected suitors to delay, expense, and often to failure of justice. The legal fictions resorted to in olden times as a means of acquiring jurisdiction, or for using one form of action to accomplish purposes not contemplated when the writ was originally devised, were still used in pleading, and were regarded as absurdities. The fact that the judge sitting as a common-law court could recognize no equitable rights, however intimately related to the subject-matter of the action before him; that he turned out of court the party who sought relief in equity, when, in the judge's opinion, he had ample remedy at law, or sent him from the law court to the same court sitting in equity, when his right was deemed an equitable one, — became a reproach to our judiciary. The conflict of the two systems, evidenced by the court giving solemn judgment as a court of

¹ A concise statement of the statutory modifications of common-law pleadings in the non-code States is given in Pepper's article on "Pleading," in the Eng. and Am. Encyclopædia.

law on legal grounds, at one term, and then at a later term, sitting in equity, enjoining the enforcement of the same judgment on equitable grounds, hastened the conclusion that our system tolerated arbitrary distinctions not resting on sound principles. A still more cogent objection to the dual procedure was that a party sued at law could not plead his equitable defences. His plea for equity carried no sound to the common-law judges' ears. He was driven to the Court of Chancery, or the equitable side of the same court, in which he was sued at law, there to bring suit, set forth the whole case, and obtain an injunction by which the plaintiff in the legal action was paralyzed from proceeding farther in the suit in the law court. Sometimes it was necessary to call on both jurisdictions to determine one controversy; and bills in equity must be filed in aid of suits at law. In numerous cases the court of equity — though its maxim is that it "delights to do justice fully and not by halves," and its claim is that when it has jurisdiction it may give all the relief necessary to complete justice — was unable to give adequate remedy, and turned the suitor over to law with his wrongs but partially redressed.

Another difficulty often arose. Frequently there was serious doubt as to which of the courts the suitor should enter for his remedy. In theory, the boundaries of the two jurisdictions were well defined; but there was much debatable land between them, where the lawyer was perplexed, knowing not whither to go for relief. At the end of a long and expensive litigation, prolonged by many delays, the fruitless result would be a judgment or decree based on the ground that the plaintiff had "mistaken his remedy," sending him out of equity to find justice before the same judge at law, or *vice versa*.

Another reproach to the ancient system in the common-law courts was the arbitrary classification of actions. If

the plaintiff brought his action in one form and by one writ, when the facts of his case required another writ, the mistake was fatal. Often it was perplexing in the extreme to decide whether the action was properly in "trespass" or "case."¹ If a pleading failed to indicate by its technical formulæ just what form of action the plaintiff had selected, or of what character the defendant intended his plea to be, — whether abatement or bar, — the mistake resulted in disaster. A large part of the labor of the courts was devoted to the hearing of arguments and the decision of questions of pleading based on the technical logic and the verbal niceties with which the science of pleading had been clogged in the age of the schoolmen.

The forms of pleading in use in this country were the objects of merited derision. The pleadings in the days of Saxon simplicity were short and simple. Stated forms were not known. They came into England with the formalism of the Norman conquerors, and afterwards grew in verbosity and the slavishness to mere form peculiar to the age of disputation upon verbal subtleties, better calculated to sharpen the intellect in disputation than to promote substantial justice. The narrow spirit in which the courts had construed language, and required the proof to correspond with the allegations in the strictest literal sense, led to repetitions and pleonasm, and the introduction of different counts stating the same cause of action in different forms. The pleadings came in time to be overladen with verbiage, uncouth phrases, and endless repetitions, unlike any other language, and at war with all the better standards of style. As Sir Matthew Hale observed, the pleaders had become "somewhat too curious," and that the science of pleading had "degenerated from its primitive simplicity, the length of the pleadings, the

¹ See *Scott v. Shepherd*, the famous "Squib Case," 2 W. Bl. 892, 3 Wils. 403.

many and unnecessary repetitions, the many miscarriages of causes, have too much witnessed."

In the period of their most "sterile exuberance" of tautology and technicality the forms of pleading in use in England came into use in this country. Once adopted, the lawyers conformed to the old precedents, under the familiar rule that pleadings should follow the ancient and approved forms, preferring the path of safety, however devious, to the hazards of departure. They were also actuated, doubtless, by the vanity to parade learning and becloud with mystery which has characterized men in all professions. But the imperfections of our system of remedial justice became more and more the object of animadversion, and finally public sentiment demanded reform.

The movement for anything like a radical change of system began in the State of New York. The Constitution adopted in 1846 remodelled the courts, abolished the Court of Chancery as a distinct tribunal, uniting the legal and equitable jurisdictions in the same courts,¹ and directed that the next Legislature should provide for the appointment of three commissioners, whose duty should be "to revise, reform, simplify, and abridge the rules and practice, forms and proceedings, of the courts of record."² A commission was appointed by the Legislature in 1847, consisting of Messrs. Arphaxad Loomis, Nicholas Hill, Jr., and James Graham. Slight progress was made until, a few months later, David Dudley Field was appointed in place of Mr. Hill, resigned. Mr. Field entered upon the task, for which he was admirably endowed by nature, and fitted by the most thorough knowledge of various systems of jurisprudence. He has the constructive faculty, the power to organize and build systems, such as has been given to a few of the great founders in human society.

¹ Const. N. Y. 1846, art. xiv. s. 5.

² Id. art. xi. s. 24.

To this venerable jurist, now advanced in years, with his powers still "shining in use," we are largely indebted for the great and beneficent change aptly denominated "The American System of Procedure,"—a system which after successful application here has in many features found approval and adoption in the great English courts, the home of our jurisprudence.

78. The principal features of the change introduced by the code may be summarized as follows:—

1. The abolition of the distinction between actions at law and suits in equity.

2. The abrogation of the different forms of ordinary common-law actions, and of the writs by which they were instituted.

3. The adoption in the main of equity rather than common-law doctrines as to parties: (a) In requiring the action to be brought in the name of the real party in interest, except in a few specified cases; (b) in allowing one or more who ought to be plaintiffs, but refuse to join as such, to be made defendants; (c) in applying the principles of the suit for interpleader to many legal as well as equitable actions, and allowing a defendant to interplead parties, where under the former practice he might file a bill of interpleader; (d) in allowing third parties who have an interest in the subject-matter *to intervene*; that is, come in and urge their claims and have their rights adjudicated; (e) in giving the court power, of its own motion, to order other parties to be brought in when their presence is found to be necessary to a complete determination of the matters before it.

4. The commencement of all actions, not by different and peculiar writs, as at common law, not by filing bill and issuing subpoena as in equity, but by serving a simple notice called a summons, which is not a writ or process,

but a mere notification to the defendant that he is required to appear and defend.

5. The bringing of all actions or suits (whatever their nature, whether legal or equitable, or whatever their form in common-law classification), where a right is sought to be enforced or protected, or a wrong redressed or prevented, in one form of action, to be designated "a civil action."

6. The abolition of all formulæ of words in pleading, and requiring the parties to state their cause of action or defence in a plain, concise manner, without unnecessary repetition.

7. The abolition of the series of pleadings of the common law, substituting for the declaration at law or the bill in equity the plaintiff's complaint, wherein he states his cause of action and his demand for judgment; substituting also, for the pleas of the defendant at law, with their peculiar forms of general issue and common or special traverses, and their order of pleas in abatement or bar, and for the pleas and answer in equity, a pleading called an answer, in which the defendant may (a) deny generally all the allegations of the complaint; or (b) deny specially such material allegations as he may desire to controvert, when he cannot deny all; or (c) deny knowledge or information sufficient to form a belief, which is made a sufficient traverse to put the plaintiff to proof of the facts of which knowledge is so denied. (d) He may state any new matter constituting a defence. This may embrace most of the pleas of the common law; and those which by the common law must be pleaded in due order — those in abatement or dilatory first, and in prescribed order, and, lastly, those in bar — may be united in the answer. (e) He may state any facts constituting a counter-claim. This allows the defendant to set up an affirmative cause of action to defeat or diminish the plaintiff's claim. It em-

braces the doctrine of "set-off," and "recoupment" of the common-law system, and the "equitable set-off" known in equity procedure, and goes much farther than any of them, as will be fully explained later on. (f) The use of the reply to deny or confess and avoid matter pleaded in the answer by way of counter-claim; but all new matter in the answer not constituting a counter-claim, and all new matter in a reply (except in a few States), are deemed controverted without formal traverse or the setting up of any responsive matter in confession or avoidance; and evidence may be given tending either to contradict or avoid the matter thus deemed controverted. (g) The use of the demurrer, as at common law, to object to the sufficiency of any pleading, complaint, answer, or reply, dispensing with the "exceptions," which are used in equity to object to the sufficiency of the pleas and answer.

8. Provisions allowing the plaintiff, under limitations, (a) to unite different causes of action in the same complaint, in many cases where it could not be done at common law; and (b) also to unite legal and equitable causes of action, a union formerly deemed impossible; also (c) provisions allowing the defendant to interpose legal defences to equitable actions, and also equitable defences to legal actions, to unite both in the same answer; and (d) allowing legal and equitable counter-claims to be united in the same answer; also (e) provisions greatly extending the set-off and the recoupment of the common law, and allowing various causes of action growing out of set-off or recoupment, or out of the same transaction and other contracts, to be pleaded as counter-claims to diminish or defeat altogether the plaintiff's recovery.

9. Provision that the plaintiff by verifying (that is, making oath) to his complaint can compel the defendant

to verify his answer, thus shutting out the latter from interposing sham or false defences.

10. Provision for various auxiliary or provisional remedies in actions, such as arrest and bail in certain actions founded in tort, attachment and garnishment in actions to recover debts; and in actions in the nature of replevin or detinue, a method for the immediate delivery of the property to the plaintiff *pendente lite* (or, while the strife is pending), and injunction to restrain acts, or the continuance of acts or omissions which would render the judgment ineffectual.

11. The abolition of the action for mere discovery to obtain facts in the knowledge or documents in the possession of the other party in aid of the prosecution or defence of actions, and in lieu thereof a provision that the adverse party may be examined by his opponent before or at the trial, the testimony so taken not to be conclusive, but to be open to rebuttal by the party calling it out. This was supplemental to the change in the common-law rule to allow parties to testify in their own behalf.

12. Without affecting the right of trial by jury, declared inviolate by constitutions in cases where it previously existed, the code provides for one mode of trial: (a) by oral examination of witnesses, or taking their depositions beforehand, *de bene esse*, and reading the same upon the trial, when the witnesses cannot be present; (b) the jury to try issues of fact in such actions as were formerly triable by jury; (c) equitable issues to be tried by the court; (d) matters involving the examinations of long accounts to be triable by referees, the judge having power to order such reference against the consent of the parties.

13. Provisions in aid of amicable controversies, (a) whereby they may submit a controversy without action to the court upon an agreed statement of facts, and accom-

panying oath that the controversy is real and the submission in good faith; and (b) provisions also for arbitration and the rendition of a judgment by the court upon the award of the arbitrators.

14. The rendition of the judgment in one general, uniform manner, but the relief given to be damages, specific recovery of goods or lands, or any relief that can be given by a law court or court of equity. The nominal distinction between a judgment and decree is dispensed with.

15. The abrogation of the different forms of writs to carry judgments into effect, and the adoption of one execution which is in form and mandate adapted to the enforcement of the judgment, where a ministerial officer is necessarily employed in its enforcement.

NOTE. — The student of Code pleading will find it well worth while to read the interesting treatise of Charles M. Hepburn on the Historical Development of Code Pleading, in which the movement for statutory reform in pleading is traced from the Statute of Westminster II. down to the New York Code of 1848, and its adoption or partial adoption in the several States. Justice is done in this work to the influence of Jeremy Bentham. "I do not know a single law reform," says Sir Henry Maine in 1874, "which cannot be traced to his influence."

NOTE. — As to the effect of the Code in abolishing the old system of pleading and permitting only those prescribed by it, see *Kolloch v. Scribner*, 98 Wis. 104; *New York S. & T. Co. v. Saratoga, etc. Co.* 88 Hun, 569. In Wisconsin, by the recent revision a cross-complaint is now permissible (R. S. 2656 a). But in New York such is not permissible. 88 Hun, 569. On the general subject, see *Pomeroy's Remedies and Remedial Rights or Code Remedies*, §§ 28-42.

PART I.

ACTIONS UNDER THE CODE.

CHAPTER I.

THE CIVIL ACTION.

79. The Civil Action of the Code.—The code of New York, as originally adopted, declared, “the distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.”¹ With slight verbal changes the above provision has been enacted in most of the States and Territories which have adopted the reformed procedure.²

The States of Kentucky, Iowa, Arkansas, and Oregon, by their statutes, have abolished the forms of actions at law, but keep proceedings in equity distinct, in form at least.³

The first inquiry suggested by this sweeping provision is, What is intended by the abolition (1) of the distinctions between actions at law and suits in equity, and (2) of the forms of all such actions? It is not intended to diminish or affect any right, primary or remedial. Every remedy and every kind of redress that a suitor could have obtained before by some one of the forms of actions at law,

¹ N. Y. § 69 (3339).

² Code Ref. 2.

³ Id. 3.

or by suit in equity, he may still obtain in exactly the same kind and measure, under "the civil action." The names and forms are abolished. The rights that were formerly known as legal are still legal rights; the equitable rights still retain that designation. No attempt is made to fuse the two systems of law and equity into one homogeneous whole. But the distinction between actions and suits is done away with; and the suitor whose right has been invaded, or who is entitled to seek a remedy in judicial proceedings, institutes, not an action at law in name, nor a suit in equity, but "a civil action."

The different *forms* of actions at law are no longer known. There is no inquiry whether the action is covenant or assumpsit, trespass, trover, or case. Disencumbered of all arbitrary forms or classification, the action is instituted by the service of the summons. The complaint or petition states the cause of action. If it entitles the plaintiff, according to the whole law of the land applicable to the case, to any relief, the appropriate relief may be granted.¹ The judgment may give a remedy that is legal in nature or equitable, or a blending of both in a proper case for such blended relief. But if the action is one that would have been trespass under the old classification, facts must be alleged and proved that would entitle the plaintiff to recover in an old action of trespass. Though the forms are abolished, the essential differences still remain; and there is a natural classification, which the codes fully recognize;² and regard is still had in the application of legal and equitable principles, according to the case stated. But the court does not consider the name of

¹ *Dodson v. Pearce*, 12 N. Y. 156, 165; *Crary v. Goodman*, 12 N. Y. 266, 268; *Troost v. Davis*, 31 Ind. 34, 39; *Wiggins v. McDonald*, 18 Cal. 127.

² *Bonesteel v. Bonesteel*, 28 Wis. 245; *Anderson v. Case*, Id. 505; *Reubens v. Joel*, 13 N. Y. 488.

the action, nor require any of the forms or language in the pleadings by which formerly the different actions were distinguished.¹

The plaintiff, in his complaint (or petition as it is called in some of the codes) states the facts constituting his cause of action, and then demands such judgment as he supposes himself entitled to. He may erroneously demand equitable relief, when his case stated is one for legal remedy only, or a legal remedy when equitable relief is applicable. His mistake in the demand for judgment does not preclude him from the proper relief in a litigated case. On the trial he is awarded such remedy as the facts alleged and proved entitle him to, regardless of the erroneous demand. The peril of an improper demand for judgment is that if the defendant do not answer, the relief cannot exceed that demanded in the complaint.²

80. The Union of Legal and Equitable Causes of Action and Remedies. — One of the grounds of objection to the former procedure was that when legal and equitable rights were involved in the same transactions, and therefore a party had both legal and equitable rights arising out of the same contracts, transactions, or subject-matter, he could not always obtain his relief in one judicial proceeding. He must "sort out" his invaded rights, and resort to equity for equitable redress, to law for legal redress. He could not unite his two causes of action in one pleading. The lawyers of the old school deemed such a union impossible. One of the objects of the codes is to permit such uniting. The language of the codes is: "The plaintiff may unite in the same complaint [or petition] several causes of action whether they be such as were formerly denominated legal or equitable, or both,"

¹ *Wright v. Wright*, 54 N. Y. 437.

² *Post*, p. 210; Code Ref. 260.

in certain cases and with reference to classes of cases to be fully considered further on.¹

Abstractly considered, it is possible to combine or unite legal and equitable rights in one litigation, as follows : (1) A legal and an equitable cause of action may be alleged, and a legal and equitable remedy be obtained. (2) A legal and equitable cause of action may be alleged, and the one remedy obtained may be legal or equitable. (3) A cause of action equitable in nature may be alleged, and a legal remedy be given. (4) A legal cause of action may be alleged, and an equitable remedy obtained. (5) In a legal action, the plaintiff may set up an equitable right or title to support his contention and obtain his remedy.

In administering the code, the courts have gone very far toward permitting all these combinations. It will here be attempted to indicate how far and how generally the union of remedies has been effected.

In the first class of cases, — viz., the uniting of legal and equitable causes of action, seeking as to one legal, and as to the other equitable remedy, — later consideration of the subject will be given under the head of Joinder of Causes of Action.² Under the other classes thus theoretically arranged may be instanced : —

1. In cases where equitable rights exist to have deeds or contracts reformed, to correct mistakes in them and make them express the real intent of the parties, the courts under the code have generally allowed the contract or deed to be reformed, which is an equitable remedy, and then allowed a recovery upon it of damages for its breach,³ in the same action, which is a legal remedy.

¹ *Post*, p. 168; Code Ref. 109-124.

² Code Ref. 109-124.

³ *Bidwell v. Astor Ins. Co.* 16 N. Y. 263; *Phillips v. Gorham*, 17 N. Y. 270; *McNeady v. Hyde*, 47 Cal. 481, 483; *N. Y. Ins. Co. v. Ins. Co.* 23 N. Y. 357; *Maher v. Ins. Co.* 6 Hun, 353; 67 N. Y. 283; *Ins. Co. v. Wall*, 31 Ohio St. 628.

2. In cases where the plaintiff alleges a cause of action entitling him to equitable relief, and upon the trial it is found impracticable for the court to give equitable relief, it will nevertheless retain the case and give damages, which, strictly speaking, are legal relief. The most familiar instance of this is the suit for specific performance of contracts to convey lands. If on the trial it appears that the defendant cannot specifically perform by reason of defective title, or some other cause, the court will retain the case and give damages for the breach of the contract.¹ If the plaintiff had sued only for the damages he must formerly have gone into a law court.²

In the two classes of cases above mentioned, there is, and long has been, clear equity jurisdiction to do the same thing. Courts of Chancery often give legal relief when for some cause unknown to the plaintiff when he brings his bill, equitable relief cannot be granted.³

3. When one sues on a contract, to reform it so as to increase the amount he is entitled to recover upon it, and also to recover such increased amount; and it appears on the trial that he is not entitled to reformation, — he may still recover the amount due. The equitable relief here is denied, but such legal relief as he might have recovered at law is given, notwithstanding the equitable nature of the action.⁴ And when one brings action praying special equitable relief, and fails to establish his right to such relief, but the facts alleged in his complaint entitle him to legal relief, he will be given it.⁵ A contrary view now obtains in Wisconsin, and is adhered to strongly

¹ *Milkman v. Ordway*, 106 Mass. 232; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Hopkins v. Gilman*, 22 Wis. 476; *Woodman v. Freeman*, 25 Me. 531, 532, 543.

² *Hatch v. Cobb*, 4 Johns. Ch. 273.

³ *Id.*

⁴ *N. Y. Ice Co. v. Ins. Co.* 23 N. Y. 357, 359.

⁵ *Marquat v. Marquat*, 12 N. Y. 336; *White v. Lyon*, 42 Cal. 279.

by that court.¹ But in these cases the right to legal relief depends entirely upon the fact that the allegations of the complaint or petition show that it is a case for legal, not equitable relief, and therefore —

4. When the complaint or petition states a case for, and demands equitable relief only, and on the trial no case for equitable relief is proved, but facts *not alleged* are proved, upon which the plaintiff would be entitled to legal relief, if duly alleged, he will not be allowed to amend his pleading so as to change the nature of his cause of action and have his legal remedy,² unless the adverse party consent to such amendment.³

Conversely, a pleading which sets up facts entitling to, and prays, legal relief cannot be amended to allow equitable relief not alleged but proved on the trial.⁴ The great liberality of amendment under the code does not extend to allowing the plaintiff to so amend as to substantially change his cause of action.⁵ Neither at law,⁶ nor in equity,⁷ under the former practice, could this be permitted.

5. Equitable relief and legal damages may be prayed in the alternative; and if it be impossible to grant the equitable relief, the legal damages will be given.⁸ But the demands must be consistent with each other.⁹

6. In a legal action it has been permitted to set up or rely upon an equitable title to sustain a right to recovery

¹ *Horn v. Ludington*, 32 Wis. 73; *Leonard v. Rogan*, 20 Wis. 542; *Stroebe v. Fehl*, 22 Id. 337, 348; *Denner v. Ry. Co.* 57 Wis. 218.

² *Emery v. Pease*, 20 N. Y. 62, 64; *Reeder v. Sayre*, 70 N. Y. 190.

³ *Lowe v. Hyde*, 39 Wis. 345.

⁴ *Drew v. Ferson*, 22 Wis. 651; cf. with *Emery v. Pease*, 20 N. Y. 62.

⁵ *Stevens v. Brooks*, 23 Wis. 196.

⁶ *Milliken v. Whitehouse*, 49 Me. 527; *Sumner v. Brown*, 34 Vt. 194.

⁷ *Waldron v. Bodley*, 14 Pet. 156; *Verplank v. Ins. Co.* 1 Edw. Ch. 46.

⁸ *Graves v. Spier*, 58 Barb. 349, 383-384.

⁹ *Linden v. Hepburn*, 3 Sand. 668; *Young v. Edwards*, 11 How. Pr. 201; *Reubens v. Joel*, 13 N. Y. 488.

in its nature legal.¹ This doctrine is, however, somewhat qualified. The action to try title to and recover possession of land, under the codes, is a substitute for the common-law action of ejectment. And it is generally deemed a legal action; and the parties have the right to jury trial in it, which under the State constitutions cannot be denied. It is, therefore, a familiar rule that in ejectment (or the code action analogous to it) the plaintiff cannot recover upon an equitable title, as the jury would be required to pass upon it in giving their verdict. Under the codes, it is generally held that the equitable owner cannot maintain the legal or statutory action of ejectment, or for recovery of possession, upon an equitable title.² The equitable owner, or one whose equity entitles him to possession, must bring an action predicated, not upon the statutory procedure of ejectment, but in its nature equitable, to establish his equitable interest, or have the title of the adverse party declared void, or conveyance or cancellation or reformation of deeds adjudged, or some other equitable remedy given; and in order to give complete relief, the court will adjudge that he be put in possession where the possession is necessary to full relief.³

¹ *Sheehan v. Hamilton*, 2 Keyes, 304.

² *Reed v. Robertson*, 45 Mo. 580; *Eaton v. Smith*, 19 Wis. 537; *Gillet v. Treganza*, 13 Id. 472, 475; *Groves v. Marks*, 32 Ind. 319; *Rowe v. Becket*, 30 Id. 154; *Emeric v. Penniman*, 26 Cal. 119. Otherwise, by statute in Kansas. *Kan. P. R. R. v. McBratney*, 12 Kan. 9.

³ Pom. Eq. Jur. 2d ed. §§ 177, 180, 185.

CHAPTER II.

JOINDER OF CAUSES OF ACTION.

81. Joinder under the Former Procedure.— At common law, certain causes of action may be joined in the same declaration, and be stated in different counts; but they must belong to the same classes. Counts in assumpsit cannot be united with counts in tort, nor with debt and covenant; but breaches of different covenants may be joined; in debt, different obligations may be united; several distinct trespasses may be set up in the same declaration. The principle is that where the same plea may be pleaded and the same judgment may be given on all the counts, when the pleas are different, and the counts are of the same nature, they may be joined.¹

In Chancery the bill may embrace different distinct claims of a similar nature, where the joinder is without inconvenience, and there is a common interest in the plaintiffs and a common liability in the defendants; and the joinder is often allowed when the interest is not co-extensive, where the general object of the bill will be promoted by the union.

82. Joinder under the Codes.— The codes pursue a similar theory to that at common law in classifying causes of action that may be joined or united in the same com-

¹ *Coryton v. Lithebye*, 2 Saund. 5th ed. 117; *Story's Eq. Pl.* §§ 531-537; *Brown v. Dixon*, 1 Term R. 274.

plaint. The great and radical change of the codes from the former systems is in permitting the joining of legal and equitable causes of action.

The Statutes.—The codes, as generally adopted, following the original New York code of 1848, usually read as follows: "The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable, or both, where they arise out of— (1) The same transaction or transactions connected with the same subject of action; or (2) Contract express or implied; or (3) Injuries, with or without force, to person or property or either; or (4) Injuries to character; or (5) Claims to recover real property, with or without damages, for the withholding thereof and the rents and profits of the same; or (6) Claims to recover personal property, with or without damages for the withholding thereof; or (7) Claims against a trustee by virtue of a contract or by operation of law. But the causes of action so united must all belong to one of these classes, and must affect all parties to the action, and not require different places of trial and be stated separately."¹ As it is necessary to treat of this subject with special reference to the drawing of the complaint, its further consideration is reserved for a later chapter.²

¹ Code Ref. 109-124.

² *Post*, p. 168.

CHAPTER III.

ELECTIONS BETWEEN ACTIONS AND REMEDIES.

83. Election generally. — In a few instances, the same breach of contract or delict may give rise to an equitable remedial right or a legal remedial right. The plaintiff may in such cases (to be presently noted) elect to pursue his equitable or his legal remedy. And under the former common-law practice, some causes of action might be brought in one of several forms of action. For example, for a sum definite in amount, due upon a sealed instrument, the action might be brought in covenant, debt, or (after that writ was devised) in assumpsit.

Again, it is a principle of law that for the unlawful taking and carrying away of chattels, trespass *de bonis asportatis*, trover, or detinue will lie.¹ But having elected to pursue one of his remedies, the plaintiff is bound by his election and must abide by that remedy.² It is also a legal principle that from certain wrongs or torts from which gain or enrichment results to the wrong-doer out of the loss suffered by the injured party, whereby a liability to make compensation is incurred, the law implies a promise to pay such compen-

¹ Cowen's Treatise, 3d ed. 466; Wait's Actions and Defenses, vol. vi. 128.

² Buckley v. Morgan, 46 Conn. 394; Bailey v. Hervey, 135 Mass. 172; Moller v. Tuska, 87 N. Y. 166; Dibble v. Sheldon, 10 Blatchf. (U. S.) 178; Morris v. Rexford, 18 N. Y. 552.

sation. Out of this principle arises the rule that the plaintiff "may waive the tort and sue in *assumpsit*;" that is, he may treat the action as a tort and bring his action *ex delicto*, or he may bring it upon the contract which the law implies, in the form of an action upon contract, and, at common law, in the action known as *assumpsit*.¹

84. Election between Legal and Equitable Remedies.

—The jurisdictions of law and equity extend concurrently to some cases of invasion of primary rights, and the plaintiff may sue at law or in equity. But the equitable jurisdiction rests on the ground that the remedy at law, though obtainable, is not adequate, and that complete relief can be found only in equity. The more frequent instances where the plaintiff may elect to sue at law, or to seek in equity a more adequate measure of relief, are: (1) Cases of specific performance of contracts. The action might be brought at law for the breach of contract, and a money recovery of damages be had; but where damages by legal measure are not adequate equity will decree a specific performance, as by compelling execution of deeds, transfer of title, etc.² (2) Actions for contribution among sureties by one or part who are entitled to reimbursement for a debt he or they have been compelled to pay for the principal. The action *may* be brought at law on the implied contract; but the better, because completer, remedy is in equity.³ At law the surety who is entitled to demand contribution of his co-sureties must sue each severally; in equity he may sue all together, and obtain decree that equalizes

¹ Putnam v. Wise, 1 Hill, 240; Norden v. Jones, 33 Wis. 600; Betts v. Collins, 13 Wend. 154; Keener's Quasi Contracts, 162.

² Story's Eq. Jur. 13th ed. vol. ii. §§ 30, 55-61; Pom. Eq. Jur. 2d ed. §§ 171, 1400; Tiedeman's Eq. Jur. § 492.

³ Dering v. Earl of Winchelsea, 1 Cox, 318.

the burden.¹ (3) Actions for exoneration, brought by a surety, who has paid his principal's debt, to recover of the principal the amount paid. This action is maintainable at law on the implied promise of the principal to reimburse the surety, or the latter may sue him in equity.² (4) Actions for the partition of lands. Anciently, an action at law or a suit in equity could be brought for partition. The latter was the most efficacious; and the statutory action now provided in most of the States follows the equity method. (5) Actions for the admeasurement of dower. (6) Actions for the settlement of disputed boundaries. (7) Actions for accounting. (8) Actions for rescission or cancellation of contracts for fraud in equity, or at law for damages for the deceit, fraud, etc., or for the recovery of chattels or land.³

85. Election between Different Actions *ex contractu*.

—For breach of contract there is sometimes an election of remedies; for example, a contractor unjustifiably prevented from completing his contract may sue in the contract for damages for its breach, or on *quantum meruit* for the work he has done.⁴ An employee or servant hired for a term and wrongfully discharged, or not permitted to enter upon his employment, may sue for breach of contract at once, or wait till the end of term and sue for his wages, less what he has or might have earned meanwhile.⁵

¹ *Foster v. Johnson*, 5 Vt. 60; *N. Y. & C. R. R. Co. v. Schnyler*, 17 N. Y. 180; *McHenry v. Hazard*, 45 Id. 580; *Elbridge v. Hill*, 2 Johns. Ch. 281; *Pom. Eq. Jur.* § 1418.

² *Pom. Eq. Jur.* § 1417.

³ *Id.* § 110.

⁴ *Rogers v. Parham*, 8 Ga. 190; *Merrill v. R. R. Co.* 16 Wend. 586; *Chamberlin v. Scott*, 33 Vt. 80.

⁵ 2 Kent Com. 59, note; *Knutson v. Knapp*, 35 Wis. 86; *Hochster v. De Latour*, 20 L. & Eq. 157. But see *Wood's Mayne on Dam.* § 280.

§6. Election between Actions *ex contractu* and *ex delicto*.—Upon the principle above stated, the plaintiff having a cause of action in tort may waive the tort and bring an action upon the implied contract. This is permitted at common law; and the codes recognize fully the distinction between actions founded on torts and those founded upon contract. The most usual cases in which the election may be made are:—

1. Where personal property has been wrongfully converted, so that an action of trover or conversion would lie. Formerly, and by one line of authorities, it was and is held that this election cannot be made unless the wrong-doer has sold or disposed of the thing; in other words, that no election is given if the wrong-doer merely retains or has converted the chattels.¹ The weight of authority in the code States allows the election to sue *ex contractu* upon the conversion, regarding the implied contract of the wrong-doer to be that he will pay the price or value of the thing converted, and not merely that he will pay over to the owner the money or thing that he received on the sale of it.²

2. Where there is a contract and a legal duty, as in the case of common carriers, innkeepers, professional men, etc. For loss of goods or injury, or other injuries resulting from their negligence, they are liable for breach of contract, but may be sued in tort, in an action upon the case, for breach of the legal duty, which, independently of the contract, the policy of the law puts upon them.³

¹ Jones v. Hoar, 5 Pick. 285; Willet v. Willet, 3 Watts, 277; Morrison v. Rogers, 3 Ill. 317; McKnight v. Dunlop, 4 Barb. 36, 42.

² Roth v. Palmer, 27 Barb. 652; Hawk v. Thorn, 54 Barb. 164; Smith v. Schulenberg, 34 Wis. 50; Roberts v. Evans, 32 N. Y. 612; Gordon v. Bruner, 49 Mo. 570; Kalchhoff v. Zoehrlant, 40 Wis. 427; Norden v. Jones, 33 Wis. 600, where distinction is discussed.

³ Brown v. Treat, 1 Hill, 225; Campbell v. Perkins, 8 N. Y. 430; Emigh v. R. R. Co. 4 Biss. 114; Church v. Mumford, 11 Johns. 479.

3. Where sales upon credit have been obtained by fraudulent representations of the vendee, the vendor may elect (a) to consider the sale one for cash and sue for the price immediately,¹ or (b) to treat them as converted and sue for their conversion,² or (c) to rescind the sale and bring replevin to recover the goods.³ And if the sale of goods be for cash and the goods delivered, and the cash be not paid, the seller may sue for the price, or, treating the sale as incomplete, replevy the goods;⁴ or if security were to be given, or the purchaser's note, and it is not given as agreed, the vendor may sue for the price, or replevy the goods.⁵

4. Money obtained by false representations may be sued for in the contract action for money had and received, or the tort action for deceit.⁶ So money obtained by extortion or duress of goods may be sued for in assumpsit.⁷

5. When one party obtains possession of goods by contract, and then so acts that he may be deemed to have repudiated the contract, the other party may sue upon the contract, or treat him as wrongfully in possession and sue in tort.⁸

37. How Election to be determined.—In making election between a contract or tort action, the plaintiff

¹ *Putnam v. Wise*, 1 Hill, 234; *Roth v. Palmer*, 27 Barb. 652; *Wiggins v. Sickel*, 33 How. Pr. 174; *Stevenson v. Newnham*, 13 C. B. 285; *Nat. Trust Co. v. Gleason*, 77 N. Y. 400.

² *Dietz v. Sutcliffe*, 80 Ky. 650.

³ *Hall v. Gilmore*, 40 Me. 578; *Hennequin v. Naylor*, 24 N. Y. 139; *Farley v. Lincoln*, 51 N. H. 577.

⁴ *Palmer v. Hand*, 13 Johns. 434; *Morris v. Rexford*, 18 N. Y. 552.

⁵ *Haggerty v. Palmer*, 6 Johns. Ch. 437.

⁶ *Byxbie v. Wood*, 24 N. Y. 607; *Union Bank v. Mott*, 27 N. Y. 633.

⁷ *Pratt v. Vizard*, 5 B. & Ad. 808.

⁸ *Homer v. Thwing*, 3 Pick. 492; *Campbell v. Stokes*, 2 Wend. 137; *Hall v. Corcoran*, 107 Mass. 251.

often finds one preferable to the other. (1) He may find the action as tort barred by the Statute of Limitations, when as contract it is not. (2) The defendant may be an infant, and in a contract action could plead infancy, which he could not in a tort action.¹ (3) Several defendants may be liable. In a contract action they must be sued jointly; in a tort action they are jointly and severally liable, and may be sued severally. (4) Where a tortfeasor has wrongfully sold plaintiff's property for more than its value, it may be preferable to sue for money had and received and recover all, rather than sue for conversion and recover actual value; but, if he has sold it for less than value it would be better to sue for conversion and recover full value. (5) In many States imprisonment for debt on contract is abolished; but in tort actions arrest and execution against the body are allowed, and may be efficacious where mere money judgment on contract would not. (6) Sometimes it may be that the defendant is insolvent, and replevin of goods or recovery of property fraudulently obtained may be better than a money judgment for damages, etc. (7) Sometimes specific performance is the better remedy; in other cases, money damages. (8) As will be seen later on, it may be desirable to unite the cause of action with another *ex contractu* or *ex delicto*, and it must then be of the same class with the others.^{2*}

¹ *Studwell v. Shapter*, 54 N. Y. 249; *Shaw v. Coffin*, 58 Me. 254; *Vasee v. Smith*, 6 Cranch (U. S.) 230.

² *Post*, p. 168. Consult, as to subject of election of remedies, the cases cited in English and American Encyclopædia of Law, Election, vol. vi. p. 247 *et seq.*

* *NOTE.* — For the citations to numerous New York authorities on the subject of election of remedies, see *Bliss's Ann. Co.* vol. i. pp. 371-376.

CHAPTER IV.

PARTIES TO CIVIL ACTIONS.

SECTION I.

PARTIES PLAINTIFF.

88. Parties to Actions: Code Provisions.—The law as to parties is an important part of the subject of pleading, as the pleader in framing his complaint or petition must first decide who are to be made parties to the action. The rules of the common law as to parties are in some respects quite dissimilar to those which obtain in courts of equity. The points of dissimilarity will be noted in the proper connection in this chapter. In framing the code it became necessary to provide one set of rules applicable to parties to the civil action, to reconcile the difference, and in some respects conflict, between law and equity. The provisions of the code as to parties are few, but they work considerable change in the common-law doctrines. Some familiar equity rules are adopted and extended in their application. Some rules common to both law and equity are retained. The statutory rules or code provisions will here be given, and brief explanation made of their meaning and effect in changing the rules of the former procedures.

89. The Real Party in Interest.—The codes very generally read: “Every action must be prosecuted in the name of the real party in interest, except as otherwise

provided in " (some designated section).¹ The exceptions are found in §§ 99-102 of the text.²

90. Who is the Real Party in Interest.—In determining who is the real party in interest in whose name an action must be brought as the party plaintiff, a simple, natural analysis will be of aid. To give a remedial right to maintain an action, some primary right must have been invaded or, in some instances, threatened. That primary right may be—(1) Of person, and absolute: (a) To liberty, and the remedy sought may be for false imprisonment; or (b) Of personal security, and the remedy sought may be (a') for injuries wilfully done to person, or (b') for injuries done or suffered by negligence of another; or (c) To health, and the redress may be damages for malpractice or negligence in professional employment, or for some nuisance maintained or suffered, tending to produce disease; (d) To reputation, and the remedy invoked may be for injuries to character by libel, slander, or malicious prosecution. These are actions *ex delicto*, or founded upon wrong, as distinguished from those founded upon contract. The real party in interest is the one whose right has been invaded, or, in case of his death, when the cause of action survives, the one or more to whom it passes by operation of law. (2) Of person and relative, and the remedy sought may be (a) for damages for seduction of wife, daughter, or servant, etc.; or (b) for damages for personal injuries to them resulting in the loss of society, service, etc., and for expense incurred by reason of the wrong or injury done them. In this class of primary rights may be placed those given by modern legislation to certain relatives of a person whose death has been caused by the wrongful act or negligence of another. The right rests upon some pecuniary interest which the widow, or, if

¹ Code Ref. 15.

² Id. 16.

there be none, the children, or, if none, the dependent parents have in the life of the deceased. Such actions, however, are usually brought by the executor or administrator of the deceased, by special authorization of statute.

(3) Of property real or personal. (a) The action may be for breach of contract, or *ex contractu*. In such case the inquiry is, whose primary right is invaded by the breach? To whom is the duty or obligation of performing the contract due? The person to whom the duty is due, and whose primary right is to have such duty performed, is the real party in interest. (b) The action may be to have some contract reformed for mistake, or rescinded or cancelled for fraud, mistake, or undue influence. The real party in interest is the party to the contract, or those claiming under such party who are entitled to such reformation, cancellation, or rescission. (c) The action may be for some wrong or injury to property real or personal, not springing out of contract, but *ex delicto*, — arising out of the wrong, either wilful or the result of negligence. Here, again, the party whose property rights have been invaded is the proper party plaintiff. (d) The action may be to establish or quiet title to property, or remove a cloud therefrom. The one who claims such title or property and the right to such quieting or removal of cloud is the proper party plaintiff in whose name the suit must be brought. (e) The action may be to recover possession of property real or personal, wrongfully detained or withheld from the true owner or some one entitled, by virtue of a special property, to the possession. The plaintiff in such case must be he who, by general ownership or special property, is entitled to the possession and to the damages that may be claimed in the action for the unlawful withholding. (f) The action may be to declare or enforce some trust in respect to property. The real party in interest is the party who stands or is entitled to stand in the relation of

cestui que trust. (g) The action may be to foreclose or cut off some equity or interest in property real or personal, and must be prosecuted in the name of the party entitled to such foreclosure or extinguishment of interest.

91. The Real Party in Interest; Effect of Rule where Cause of Action has been assigned.—The most important effect of the provision that “every action must be prosecuted in the name of the real party in interest” is to change an arbitrary rule of the common law. In early times it was deemed contrary to the policy of the law to permit the assignment of a chose in action. It was thought dangerous to private security to allow one to purchase a right of action and sue upon it. The law courts in time perceived the unreasonableness of the rule, and tolerated an evasion of it. While they held that the assignee could not bring an action upon a cause of action assigned to him, yet if he brought action in the name of the assignor, the rule was not literally violated; and the assignee was permitted to control the litigation and reap its fruits.

In equity, on the other hand, this strict rule found no favor. It was there seen that trade, commercial intercourse, and the demands of a business-doing people required that choses in action, as well as other property, might be assigned; and the assignee in a court of equity might and must sue in his own name. It is said, with some irony, “that if the assignee sues at law he is turned out of court, and if the assignor sues in equity he is turned out of court.” The code adopts the equity rule, and requires the action to be brought in the name of the assignee as the real party in interest.

But this statute is not “deemed to authorize the assignment of a thing in action not arising out of contract.” This means that it leaves the rules of law just as they

were. Nothing is now assignable that was not in reality assignable before; but where a cause of action is of such a nature that it may be assigned, the assignee brings the civil action of the code upon it in his own name. This leads to the inquiry, —

92. What Things in Action are assignable?— Before the codes, (1) contracts in the form of negotiable paper were assignable. (2) Those contracts of a non-negotiable nature, with a few exceptions, — such as contracts of marriage, or for personal skill, and claims for injury because of want of skill or neglect to exercise it, — were assignable, with the restriction that the assignee must bring action in the name of the assignor. (3) In equity, the suit was brought, as has been said, upon an assignable cause of action, in the name of the assignee. In the earlier times, after the assignment was really allowed, the test of assignability was said to be the *survivability* of the cause of action. If it survived the plaintiff upon his death, and passed to his personal representative, it was assignable. The ancient rule as to the survival of causes of action was expressed in the maxim, *Actio personalis moritur cum persona* (The personal action dies with the person). Only such actions as debts or contract obligations survived to the executor or administrator. All actions *ex delicto*, or in which the plea of the general issue of “not guilty” is the proper plea, are said to die with the person *by* or *to* whom the wrong is done. An early English statute (4 Edw. III. c. 7) gave an action in favor of the personal representative for injuries done to personal property in the lifetime of the decedent, as such injuries tended to diminish the estate which came to the executor or administrator.

The doctrine that the personal action dies with the person has been shorn of most of its significance by modern

legislation in England and the United States. In many of the States all causes of action, except libel and slander, survive, and in several even those survive.

93. Survivability how far the Test of Assignability. — It is a general rule that whatever cause of action survives to the personal representative can be assigned, because the survival itself is an assignment by the act of the law, and what the law can assign upon the death of the owner he might assign while living. With the statutory extension of the rule of survival, it is generally held in the absence of statutory limitation, that the assignability is also extended.

Generally, it may be said that in American law, —

1. All causes of action arising out of contract are assignable, except (a) such as arise out of contracts to *marry*, (b) or for *personal services*, (c) or contracts the assignment of which is forbidden by statute, such as pensions, claims against the government, etc.

2. All causes of action for injury to property real or personal survive and are assignable.

3. As to causes of action for injury to person or character, the statutes of the several States are variant, and must be consulted for departures from the common-law rule. A synopsis of the statutes relating to the survivability of actions is given in the subjoined note.*

NOTE. — *Alabama.* All actions on contract, all personal actions, except for injuries to person or reputation, survive to and against. Code, § 35. *Arkansas.* Wrongs to person or property, except slander and libel, to and against. Digest, '94, § 5908. *California.* Ejectment, replevin, waste, conversion, or trespass to realty or personalty. Civ. Code, §§ 1582, 1584. *Colorado.* All actions, except for slander and libel, or injury to person, to and against. Mills' Ann. Sts. § 4810. *Connecticut.* All actions for injuries to person, causing death or not. Gen. Sts. § 1008. *Delaware.* All personal actions (except assault and battery, defamation, malicious prosecution, or injury to person or upon penal statutes), to and against. Rev. Code '93, p. 787. *Florida.* All actions for personal injuries, to wit, assault and battery, false imprison-

ment, and malicious prosecution, die with person. Others survive. Actions of tort survive (Code '95, § 3825), but rights for personal torts or injuries from fraud not assignable. *Id.* 3079. *Idaho*. Same as California. *Illinois*. Replevin, injuries to person (except slander and libel), to realty or personalty, detention or conversion of personalty, actions against officers for misfeasance, nonfeasance, or malfeasance of selves or deputies, and actions for fraud and deceit. S. & C. Ann. Sts. p. 344. *Iowa*. All causes of action survive (Code '97, § 3843) and are assignable. 50 Ia. 497. *Indiana*. Causes for injury to person (except for death by wrongful act), seduction, false imprisonment, and malicious prosecution, die with person (Thornton's Sts. § 284); others survive. *Id.* § 285. *Kansas*. Causes for *mesne* profits, injuries to person, to realty or personalty, or for deceit or fraud. Gen. Sts. '97, p. 214. *Kentucky*. No right of action for personal injury or to real or personal estate dies with person (except for slander, libel, criminal conversation, and so much of malicious prosecution as is for the personal injury). Sts. '94, p. 176. *Louisiana*. All causes survive to widow or minor children; if none, to surviving parent. Civ. Code, § 1934. *Maine*. Replevin, trover, assault and battery, trespass, trespass on case, and petitions for review, to and against. R. S. '83, p. 445. *Maryland*. All personal actions, except slander and injuries to person. Illegal arrest, false imprisonment, deprivation of liberty without due process, unlawful searches or seizure, etc., survive. *Massachusetts*. Replevin, tort for assault, battery, or other injury to person, for goods taken and carried away or converted, or for damage done to real or personal estate; and actions against sheriffs for misconduct of selves or deputies. Pub. Sts. p. 958. *Michigan*. Replevin, trover, assault and battery, false imprisonment, for goods taken and carried away, for negligent injuries to person, and for damages to realty and personalty. Howell's Sts. § 5912. *Minnesota*. Causes arising out of injury to person die with person of either save where death caused. *Mississippi*. All personal actions (Am. Code '92, § 1916), only compensatory damages. *Id.* § 1917. *Missouri*. For all wrongs to property, or rights, but not slander, libel, assault, and battery, false imprisonment, or actions on the case for injuries to person. R. S. '89, §§ 96, 97. *Montana*. All causes of action survive. Code Ann. § 587. *Nebraska*. For *mesne* profits, injury to realty or personalty, for deceit or fraud. Com. Sts. Ann. '95, § 6033. *Nevada*. Same as California. Laws '97, p. 145. *New Hampshire*. Actions for physical injuries, though inflicted by one committing felony, limited as to amount, time, and beneficiaries. Sts. '91, p. 535. *New Jersey*. For trespass to realty or personalty, waste, conversion, taking or carrying away of personalty, to and against. Gen. Sts. p. 1426. *New York*. For

wrongs to the property, rights, or interests, actions survive to and against, except slander, libel, false imprisonment, or actions on the case for injuries to the person. 2 R. S. p. 447. Claims not assignable for personal injury (which include libel, slander, criminal conversation, or other actionable injury to person of plaintiff or another), breach of promise to marry, or on void grant or where transfer is forbidden by law. Code, §§ 1910, 3343. *North Carolina*. All demands, save libel or slander, assault and battery, or injury not causing death, and causes against husband for ante nuptial debts, and where relief would be nugatory after death. Battle's Rev. p. 413. *North Dakota*. Trespass to realty, for waste, destruction of, or taking, carrying away goods. R. S. '93, § 6469. *Ohio*. For mesne profits, or injuries to person or property, or deceit or fraud. Bales Ann. Sta. '97, § 4975. *Oklahoma*. Same as Ohio. Sta. '93, § 4312. A thing in action arising out of violation of a right of property, or out of an obligation, may be transferred. Id. 3839. *Oregon*. Causes for injury to person die with person, except wrongful act causing death, or injuries to child or ward, or after verdict. Hill's Ann. Sta. §§ 369, 39, 34. Causes in equity survive. Id. § 472. *Pennsylvania*. Mesne profits, trespass to realty or personalty survive wrong-doer (Pepper and Lewis Dig. p. 3628); also injuries wrongfully to person. P. L. '95, p. 236. *Rhode Island*. Waste, replevin, trover, trespass, and trespass on case for damages to person or property, but vindictive damages not allowed. G. L. '96, p. 806. *South Carolina*. Injuries and trespasses to realty, or for taking goods, etc. R. S. '93, §§ 2323, 2319. *South Dakota*. Same as California. *Levissee's Dak. Code*, v. 1, p. 247. *Tennessee*. Injuries to realty. Code '96, § 5164. *Texas*. Injuries to health, reputation, or person, to and against. Sayles v. Civ. Code, § 3353 a, Acts '95, ch. 89. *Utah*. Same as California. R. S. '98, §§ 3914-3916. *Vermont*. Ejectment, replevin, trover, trespass, trespass on case for damages to property, or bodily injury. No vindictive damages. Sta. '94, §§ 2446-2447. *Virginia*. Trespass or case for taking and carrying away goods, or waste, destruction, or damage to any estate. Code '87, § 2655. *Washington*. All causes of action survive (except where death is caused, which causes accrue in some cases to heirs). Ballinger's Code '97, § 5695. But torts are not assignable. 4 Wash. 783. *West Virginia*. Same as Virginia. Code '91, p. 684. *Wisconsin*. Replevin, conversion, assault and battery, false imprisonment or other damage to person, for goods taken and carried away, for damages to realty and personalty; actions to set aside conveyances of real estate, or quiet title, or for specific performance. Ann. Sta. § 4253; for wrongs done to the property, rights, or interests, except slander or libel. Id. 3252. *Wyoming*. Same as Ohio. R. S. '87, § 2364.

94. When not prosecuted in the name of the real party in interest, that fact may be relied upon as a defence in abatement but not bar, and is waived, if not raised, by demurrer or answer.¹ And this defence, it is held, cannot be raised when an indorsee of a negotiable instrument sues upon it; for, by the law merchant, the indorsement and transfer carry to him the legal title, and for the purposes of the action he is deemed the owner.² Indorsements for collateral security,³ or those which are in fact conditional though absolute in form, confer upon the indorsee the right to sue in his own name⁴ for the whole amount due.⁵ The question in such cases is, has the plaintiff the right to receive the money, and will the defendant be protected from any other claim founded on the same demand?⁶ If so, he may maintain the action. But an indorsee "for collection" only cannot sue in his own name.⁷

95. Assignment cannot prejudice the Defences of Defendant. — The code rule that the assignee must sue in his own name renders necessary a qualification for the protection of the defendant. It is found, in slightly variant language, in the codes, thus: "In case of the assignment of a thing in action, the action of the assignee shall be

¹ *Deverill v. Robbins*, 20 Wis. 142.

² *Eaton v. Alger*, 47 N. Y. 345.

³ *Hays v. Hathorn*, 74 N. Y. 486; *Wetmore v. San Francisco*, 44 Cal. 294; *Hilton v. Waring*, 7 Wis. 492; *Curtis v. Mohr*, 18 Id. 615; *White v. Phelps*, 14 Minn. 27.

⁴ *Hilton v. Waring*, 7 Wis. 492; *Randolph on Com. Paper*, § 796.

⁵ *Ginnocchio v. Canal, &c. Co.* 67 Cal. 493.

⁶ *Hays v. Hathorn*, 74 N. Y. 496; *Cottle v. Cole*, 20 Ia. 481; *Castner v. Sumner*, 2 Minn. 44.

⁷ *Iselin v. Rowland*, 30 Hun, 488; *Rock River Bank v. Hollister*, 21 Minn. 385, *White v. Nat. Bank*, 102 U. S. 658. *Contra*, *Hardin v. Hatton*, 50 Ind. 319.

without prejudice to any set-off or defence existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due.”¹ Under this provision it is to be noted that —

1. The defendant when sued by the assignee of a non-negotiable cause of action may set up all the defences, whether legal or equitable, which he had against the assignor at the time he received notice of the assignment.

2. If the defendant have a counter-claim against the assignor, existing at the time of the assignment, upon which he might have maintained an action, he may plead it as a defence (but not as a counter-claim) in the action of the assignee.

3. This doctrine applies to second and subsequent assignees. If A have a non-negotiable claim against B, and assign it to C, B may plead any defences in the action brought by C that he might have pleaded if sued by A. If C assigns the claim to D, and he sues, B may plead the same defences which he had against A; and —

4. B may set up in such action by D all the defences or set-offs that he has against A, C, or D, which existed at the time of his receiving notice of the respective assignments by each of them, and make them all available in the action brought by D.

96. Latent Equities of Assignor. — Where an assignor assigns a thing in action as collateral security, or conditionally, with some reservation of interest, and the assignee assigns to a second assignee, who buys without notice of the first assignor's rights, the question may arise, Does the second assignee take subject to the rights of the first assignor? The answer is — (1) He does take subject

¹ Code Ref. 19.

to the interest of the first assignor, (2) unless by the terms of the assignment the first assignor has estopped himself from setting up any claim as against the second assignee.¹ By giving a power of attorney to the assignee to sell or transfer the thing assigned, and an absolute assignment, the first assignor estops himself from setting up his "latent equities."² The doctrine above stated rests upon the general principle that an assignor of a thing in action can transfer no better right than he possessed.³

97. Plaintiffs suing in Representative Capacity.—The exceptions to the rule that the action must be in the name of the real party in interest are specified in the section of the code that usually reads: "An executor, an administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." In some of the code States there is an addition to this section of the words: "Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."⁴ It will be necessary, whether this provision is found in a State code or not, to consult the statutes of the State as to the manner of bringing actions by and against officers or upon official bonds.

98. Executors and Administrators may sue in their own Names.—(1) Such is the rule of the common law in

¹ *Bush v. Lathrop*, 22 N. Y. 535.

² *McNeil v. Nat. Bank*, 46 N. Y. 325.

³ *Pom. Rem.* §§ 158-161.

⁴ *Code Ref.* 16.

respect to all the assets or personal estate of the decedent, including rights of action, because the legal title of such passes to the executor or administrator upon the death of the testator or intestate.¹ (2) They may sue in respect to real property when, by the will of the testator, the executors or administrators, with the will annexed, take title to the lands in trust, or are given a right or control of possession. In such case they take rather as trustees than as executors, etc. (3) By a provision found in several of the code States, the executor or administrator may sue in ejectment (or its analogous code action) to recover real property. In such case they sue not so much by virtue of their executorship or administratorship as by being "persons expressly authorized by statute to sue."² (4) They may sue for damages for injuries to the real property of the decedent done in his lifetime, for the right of action thus created passes to the personal representative.³ (5) They may sue for damages for breach of contract to convey land to the decedent, for the recovery goes into the funds; but if the action is for specific performance, the heirs are the proper plaintiffs.⁴ (6) Under statutory provisions now becoming quite common, the executor or administrator is authorized to bring actions to set aside conveyances made by their decedents, on the ground that they were made in fraud of creditors. By the rule of the common law the executor or administrator cannot attack such a conveyance in his representative character. The creditors only can make such attack; but by this kind of statute he is authorized to sue, as the

¹ *Noon v. Finnegan*, 32 Minn. 81; *Page v. Tucker*, 51 Cal. 119; *Greenleaf v. Allen*, 127 Mass. 248.

² Code Ref. 16.

³ *Snider v. Croy*, 2 Johns. 227; *Webster v. Lowell*, 139 Mass. 172; *Fronst v. Bruton*, 15 Mo. 619; *Haight v. Green*, 19 Cal. 113; *Howcott v. Warren*, 7 Ired. L. 20.

⁴ *Webster v. Tibbitts*, 19 Wis. 438; *Peter v. Jones*, 35 Ia. 512.

fruits of the litigation would come to his hands to be used in satisfying the demands of the creditors.¹ But usually the creditors must give security to defray the expenses of the litigation, which is for their benefit. (7) The principles of Lord Campbell's Act (9 & 10 Vict. c. 93) "for compensating the families of persons killed by accident, through the wrongful act, neglect, or default of others," have been adopted in most, if not all, the States of the Union in similar legislation. These statutes generally authorize the executors or administrators to bring these actions for the benefit of the wife, husband, children, or parents of the deceased persons, for damages up to a fixed amount which are proportioned by the jury according to the loss in a pecuniary aspect suffered by the person in such relation.

99. When Executors and Administrators may sue individually.—When the executor or administrator sues upon a chose in action that came to him through the deceased, he must sue upon it in his representative capacity, which must be properly alleged in the pleading; but upon a promise made to him, or a foreign judgment obtained by him,² although in his fiduciary capacity, he may sue either individually, without allusion to his executorship, etc., or in his proper representative capacity.³

100. Trustee of an Express Trust.—The code provision authorizes a trustee to sue in his own name without joining the person for whose benefit the action is brought.

¹ Ariz. § 1192; Dak. Sta. 1887, § 5868; Ga. Sta. 1887, § 5558; Mont. Prob. Pr. Act, § 235; Neb. Cobby's Ann. Sta. 1891, § 1270; Nev. B. & H. Sta. § 2871; R. S. c. xix. § 204; Oklahoma Sta. 1890, cxix. § 9 (§ 1465); Wash. (Hill's S. & C. 189), § 1047; Wis. § 3832.

² Nichols v. Smith, 7 Hun (N. Y.), 580.

³ Mowry v. Adams, 14 Mass. 327; Bright v. Currie, 5 Sandf. (N. Y.) 433; Olive v. Townsend, 16 Ia. 430; Lawrence v. Vilas, 20 Wis. 381.

The trustee who may thus sue, it will be observed, is the trustee of an *express* trust, who is defined to be one created by the positive acts of the parties, by some writing, deed, or will, when it respects realty,¹ and by at least some express agreement when it respects personalty.² The language of the statute excludes the trustee, whose trust relation is implied, or results from the acts or conduct, or situation and relation, of the parties. The statute enlarges the technical signification of the term "trustee of an express trust" by declaring that it "shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." This may include an agent who in his own name, not the name of the principal, makes a contract for the benefit of the principal,³ such as an auctioneer suing for the price of goods sold,⁴ or sheriff for the price of goods sold on execution.⁵ It also includes the obligees in many official and other bonds given to some public officer really for the benefit or security of private persons. On such obligations the official obligee may generally sue, or the injured parties, at their own cost and risk, may prosecute in his name.⁶ The statute especially applies to cases where agents of unknown and undisclosed principals make contracts in their own names, within the scope of their authority, and in behalf of their principals. The agent in such case may sue in his own name.⁷ It also applies generally where the contract is made in the name

¹ *Robbins v. Deverill*, 20 Wis. 150.

² *Weaver v. Trustees*, 28 Ind. 112.

³ *Considerant v. Brisbane*, 22 N. Y. 389.

⁴ *Minturn v. Main*, 7 N. Y. 224; *Hulse v. Young*, 16 Johns. (N. Y.) 1.

⁵ *Armstrong v. Vroman*, 11 Minn. 220; *McKee v. Lineberger*, 69 N. C. 217, 239.

⁶ *Hunter v. Comm'rs*, 10 Ohio St. 515; *State v. Moore*, 19 Mo. 369.

⁷ *Rowe v. Rand*, 111 Ind. 206; *Colburn v. Phillips*, 13 Gray (Mass.), 64.

of the agent, though he may have been known to act as agent, and where by the usage of trade, or the scope of his authority, he is authorized to act as owner or principal, notwithstanding his well-known position as agent, but his right to bring action is subordinate to that of the principal.¹

101. **When the Cestui que Trust may sue.**—The language of the statute is permissive. The trustee *may* sue without joining the beneficiary. It is not essential in all cases that he sue alone; nor is it forbidden the *cestui que trust* to join,² or himself to sue alone.³ The rule remains much as it is in equity. When real estate is vested in trustees by devise or grant, and they are empowered to sell and convey, to control and manage, and to give discharge of proceeds, there is no reason for, or propriety in, the *cestui que trust* joining in actions.⁴ This provision of the statute is, of course, without operation upon the right of the *cestui que trust* to sue the trustee to compel performance of the trust, stay waste, etc.,⁵ or intervene where the trustee is proceeding collusively in an action, or otherwise in fraud of the beneficiary's interest.⁶

102. **Persons authorized by Statute to sue.**⁷—This provision applies to many cases where public officers are authorized by law to sue, by virtue of their official character, in many matters, either for the benefit of the public or individuals. They are to sue in their individual names, adding their title of office; and the complaint should con-

¹ *Rowe v. Rand*, 111 Ind. 206.

² *Hubbard v. Medbery*, 53 N. Y. 98.

³ *Potter v. Potter*, 8 Civ. Proc. (N. Y.) 150.

⁴ *Kerrison v. Stewart*, 93 U. S. 155; U. S. Eq. Rules, 49, 50.

⁵ *Tyler v. Houghton*, 25 Cal. 29.

⁶ *Hubbard v. Medbery*, 53 N. Y. 98.

⁷ Code Ref. 18.

tain the proper averments of official character,¹ and that in such character the action is brought.

103. *Guardians of infants, lunatics, spendthrifts, and the like are a class of trustees; but the legal title to the lands and estates of their wards does not pass to them. It is in some courts held that in actions relating to the lands of their wards they should sue in the name of the wards by guardian.*² In New York, Indiana, and Arkansas it is ruled that they are "trustees of express trusts" within the meaning of this statute, and may sue as such in their own names.³ Where the action is brought upon an express contract made by the guardian in behalf of his ward, it may be in the name of the guardian without joining the ward.⁴ And on such contract, the guardian may be sued without joinder of the ward.⁵

SECTION II.

JOINDER OF PLAINTIFFS.

104. *Code Provisions.*—The code provisions in the several States respecting the joinder of parties plaintiff generally follow closely the original New York code, and

¹ *Paige v. Fazackerly*, 36 Barb. 392; *Gould v. Glass*, 19 Barb. 179; *Cairns v. O'Brien*, 40 Wis. 469.

² *King v. Cutts*, 24 Wis. 625; *Richmond v. Adams Nat. Bank*, 152 Mass. 359, 25 N. E. 731; *Morford v. Dieffenbacker*, 54 Mich. 593.

³ *Person v. Warren*, 14 Barb. 488; *Field v. Fowler*, 4 N. Y. Sup. Ct. 598; *Coakley v. Maher*, 36 Hun (N. Y.), 157; *Bearss v. Montgomery*, 46 Ind. 544; *Turner v. Alexander*, 41 Ark. 254, under Gault's Ark. Sta. §§ 4472, 4491.

⁴ *Thomas v. Bennett*, 56 Barb. 197; *Stevenson v. Bruce*, 10 Ind. 397; *McKinney v. Jones*, 55 Wis. 39.

⁵ *Stevenson v. Bruce*, 10 Ind. 397; *McKinney v. Jones*, 55 Wis. 39.

are as follows: (1) "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided" (in this chapter, title, or by law).¹ (2) "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint [or petition]." ² Other provisions will be given later in this chapter.

105. Rules as to Joinder of Parties under these Provisions.—A proper understanding of these statutes above quoted renders necessary a brief mention of a few familiar rules of the common law on this subject applying to legal actions; namely:—

1. Where rights are joint, the parties jointly interested in their redress or enforcement must join as plaintiffs in the action. The legal right is deemed a unit, and redress cannot be given to only a part of those entitled to recover for its invasion.

2. Where the rights are joint or several, the parties jointly or severally interested may join or sue severally. By the common-law rule also, they must all join or all sue severally. Part cannot join and part severally sue.

3. Where the rights are several, the parties having each a several interest must sue alone. As a right is a unit, two persons having each a several right cannot unite them to make them the subject of one legal action.

Applying these principles to contracts, when a promise, whether sealed, written or oral, is made to two or more persons, and creates a joint legal interest, they must sue upon it jointly, even though the promise is to them jointly

¹ Code Ref. 10, 11.

² Id. 12.

and severally ; but if in terms joint, yet it creates a several distinct interest, the persons owning the distinct, legal interest must sue severally. For example, if A demise to B and C, to one a tract of land, to the other another tract, and in the lease covenant with them jointly that he is seised and is the owner of both tracts, and will maintain them in possession, the covenant, though joint in terms, is several as to each, as their legal interests are several. Each must sue severally for a breach of this covenant, for it affects his distinct interest.¹ But when A covenants with B and C to pay C a sum of money, the covenant is joint, the interest is *joint in the contract*, and B and C must join in the action for the breach.² The interest is a "technical, legal interest ;" and the different rule under the codes will be presently explained.³

The common-law doctrine as to joinder of plaintiffs in actions for torts proceeds on the same strictly logical theory. When persons are jointly interested in property, real or personal, they must sue jointly in respect to it. If their interests are distinct and several, they cannot join. Thus, joint tenants must sue jointly.⁴ Tenants in common must, for injuries to the premises, such as trespass, nuisance, etc., sue jointly. Tenants in common must sue severally in ejectment and for injuries affecting their right of possession.⁵ In many States this common-law rule has been changed by statute, so as to allow joint tenants, or tenants to sue jointly, or each severally for his share.

¹ *Slingsby's Case*, 5 Co. Rep. 18 b.

² *Anderson v. Martindale*, 1 East, 497 ; 1 Pars. on Cont. 14-16 and notes.

³ *Post*, p. 141.

⁴ Co. Lit. § 311 ; *Webster v. Vanderventer*, 6 Gray, 428 ; 1 Washb. Real Prop. c. xiii. § 1, par. 13.

⁵ Co. Lit. § 311 ; *Rehoboth v. Hunt*, 1 Pick. 224 ; *Hughes v. Halliday*, 3 Greene (Ia.), 30 ; 1 Washb. Real Prop. c. xiii. § 3, par. 18.

106. Equity Rules as to Parties Plaintiff.—In equity the rules as to parties plaintiff are much more flexible than at law. It is deemed more important in equity that all parties be before the court than that they stand as plaintiffs. Where several have an interest in the subject-matter, though that interest be not joint, they may often be plaintiffs. Their rights need not be the strict legal unit of the common law, and the relief sought need not be the same to each in all cases. There are two classes of co-plaintiffs in equity: (1) Those whose rights and interests are joint in the strict sense of the term. These ought usually to be joined, but often one of them sets the cause in motion; and it is no insuperable objection that the others are defendants, when more properly they should be co-plaintiffs, as the court on full hearing, with all the parties before it, may give each the proper relief to which he is entitled, whether he be plaintiff or defendant. (2) Those who are not jointly but collaterally interested in the subject-matter. Their interests may be distinct and separate, but should be antagonistic to the defendant, and to that extent in common; but they may seek different relief, or relief in different degree. Such may have concurrent equitable rights growing out of the same subject-matter or a part of it. They need not be interested in the whole. Two principles in equity control as to parties. One is that "equity delights to do complete justice, and not by halves;" the other is that equity discourages a multiplicity of suits. Hence, when the plaintiff seeks relief in equity, he must bring before the court at the institution of the suit, or there must be brought in afterwards, all who are so related to or connected with the subject-matter that, if they are not brought in and included in the decree, they might set up some future claim, or begin a future litigation founded on the same subject-matter, against the same defendants.

107. Code Rules as to Joinder of Parties Plaintiff.—The following rules may be formulated as a brief statement of the law, as settled by interpretation of the code, as to the joinder of parties plaintiff.

1. *Parties jointly interested should join.*—Those whose interest in the subject-matter—that is, the matter or thing concerning which the action is brought—is joint ought to join as plaintiffs; but any who refuse to so join may be made defendants. This is a well-known rule of equity, that an unwilling joint-owner may be made defendant; and the codes have adopted it, and made it applicable to legal as well as equitable actions. Hence, (a) in actions upon covenants or promises, joint obligees, covenantees, or promisees ought to be joined as plaintiffs.¹ (b) For injuries to land, such as trespass, nuisance, and the like, joint tenants should sue jointly.² So should tenants in common sue jointly for like injuries, because there is unity of possession, and the injury is to the possession.³ (c) When personal torts produce a joint injury to all of several persons, as where a firm is libelled or slandered, or goods are obtained from it by false representations, they should sue jointly.⁴ So the joint owners of land or personalty⁵ may sue for slander of title, and join in an action for damages.⁶ (d) Joint owners or owners in common of chattels or personal property should jointly sue to recover. Their ownership being a unit, all must sue.

2. *When there is "Defect of Parties."*—If the interest of two or more in the subject-matter is joint, and all are

¹ Chitt. Pl. (Sp. ed.) p. 8 a; Wright v. Post, 3 Conn. 142; Hill v. Tucker, 1 Taunt. 7; Dicey on Parties, 11, 104 n.

² 1 Chitt. Pl. (Sp. ed.) p. 64.

³ 1 Chitt. Pl. (Sp. ed.) p. 65.

⁴ Lewis v. Chapman, 19 Barb. 252; Pars. on Partnership, 337; Chitt. Pl. (Sp. ed.) p. 65.

⁵ Towns. L. & S. § 206.

⁶ Dicey on Parties, 382; Edwards v. Burris, 60 Cal. 157.

not made plaintiffs, or defendants upon their refusal to be plaintiffs, there is a "defect of parties," of which there will be later explanation.¹ It is ground for demurrer.²

3. *Conversely*, where rights are several, or injury not joint, the parties injured cannot unite in bringing the action.³ Thus, if a voluntary association be libelled, each member must sue severally;⁴ and if two or more not partners sue for malicious prosecution, though prosecuted together, they must sue severally,⁵ for the wrong is to each individually.

106. **Plaintiffs may join where Interest is Common though not Joint.**—The sections of the code above quoted—that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs;" and that "of the parties to the action, those who are united in interest must be joined as plaintiffs; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant"—are now to be considered, with reference to the joinder of those whose interests are not joint, but merely common. It will be observed—

1. That while they must have *an* interest, it need not be *joint*.

2. That such interest need not necessarily be an *equitable*, but may be either a *legal* or an *equitable* interest.

3. That the joinder is not compulsory, but the statute is permissive. The force of the statute can best be illustrated by a few—

¹ *Post*, p. 164.

² Code Ref. 134.

³ *Girard v. Beach*, 3 E. D. Smith, 337; *Hinkle v. Davenport*, 38 Ia. 355.

⁴ *Rhoads v. Booth*, 14 Ia. 575.

⁵ *Id.*

4. *Instances of Joinder of Legal Interests not joint.*—Several creditors had attached a debtor's goods by separate attachments on which the sheriff made levies. The defendant then gave a "forthcoming bond" to the sheriff, upon which the goods were released. This bond being for the benefit of the several creditors, they were allowed to sue upon it, though their interests were distinct and several.¹ An injunction had been granted which interfered with three persons' interests. The interests were distinct and separate, but they were obligees in the bond or undertaking given upon the issuing of the injunction. They were allowed to join in an action on the bond, each to recover the damage that was caused to his own interests.² Several school districts having each an unascertained and unequal interest in a sum due, joined in action, legal in nature, upon it.³ A remainderman was allowed to join with the owner of the particular estate to recover damages past and future for flowing land.⁴

5. *Instances of Joinder of Plaintiffs whose Equitable Interests are not joint.*—The joinder of plaintiffs having an interest in the subject of the action and in the relief demanded, not joint in its nature, is very common in equity. The code provision under consideration is but a statement of the equity rule. A few instances out of a great number are here given to illustrate its application. Where different creditors have several debts secured by one mortgage, they may join in foreclosure.⁵ Or where there are several notes secured by the same mortgage, and transferred to different holders, all should join in the fore-

¹ Rutledge v. Corbin, 10 Ohio St. 478, 484.

² Loomis v. Brown, 16 Barb. 325. See contrary ruling in Pelly v. Bowyer, 7 Bush, 513.

³ School Dist. v. Edwards, 46 Wis. 150; but so held because not demurred to for misjoinder.

⁴ Schiffer v. Eau Claire, 51 Wis. 385.

⁵ Goodall v. Mopley, 45 Ind. 355.

closure.¹ In actions to redeem from a mortgage, all who are interested in the redemption, though not jointly interested, may be plaintiffs, for the redemption must be complete.^{2*} In action to set aside a foreclosure sale for the fraud of the sheriff, the mortgagor and mortgagee may unite.³ Where action is brought for an accounting, with other relief also demanded, all persons who are interested in the accounting must be plaintiffs, though their interests are distinct.⁴ All parties should be before the court,⁵ unless beyond its jurisdiction.⁶ Owners of separate parcels of land may join in an equity action to prevent some act that will work them a common injury; as, for example, the creation or continuance of a nuisance,⁷ or to enjoin the collection of an illegal assessment for local improvements;⁸ or to prevent a railroad track from being constructed so as to injure or interfere with the use of their several lots;⁹ or to declare void a contract entered into by a municipality in excess of authority, and which will if carried out increase their taxes;¹⁰ or to enjoin the diver-

¹ *Pettibone v. Edwards*, 15 Wis. 95.

² *Daniel's Ch.* 212.

³ *Berkshire v. Shultz*, 25 Ind. 523.

⁴ *Petrie v. Petrie*, 7 Lans. 90; *Eldridge v. Putnam*, 46 Wis. 205.

⁵ *Eldridge v. Putnam*, *supra*; *Ireton v. Lewes*, Finch, 96.

⁶ *Story's Eq. Pl.* § 78.

⁷ *Peck v. Elder*, 3 Sandf. 126; *Foot v. Bronson*, 4 Lans. 47; *Pettibone v. Hamilton*, 40 Wis. 402; *Pom. Eq. Jur.* § 245, 257.

⁸ *Uppington v. Oviatt*, 24 Ohio St. 232.

⁹ *Tate v. R. R. Co.* 10 Ind. 174; *Atchison Street Ry. Co. v. Nave*, 38 Kan. 744.

¹⁰ *Peck v. School Dist.* 21 Wis. 516.

* NOTE. — A different rule now obtains in some States by statute allowing owners of undivided interests or distinct parcels to redeem, after decree of foreclosure, as to their part, on payment *pro rata*. E. S. Wis. An. Sts. § 3166.

sion of a mill-stream above their several mills or lands.¹ Judgment creditors may join in an action to compel discovery and to set aside fraudulent conveyances made by their debtor.²

109. Joinder of Plaintiffs in Foreclosure of Liens of Mechanics, etc.—By the general principles of joinder persons having separate liens on real property cannot join in a single action to foreclose such liens.³ But late legislation in several of the States permits such joinder, or provides that all lien-holders be brought in as parties plaintiff or defendant. Thus a beneficial remedy to satisfy all liens in one foreclosure and sale of the property, subject to the lien, is provided.⁴

110. Joinder of Different Assignees.—Where a cause of action has been assigned to several assignees, a distinct part to each, they may all join in an action upon it,⁵ and the partial assignment is no defence. And, in California, assignees of distinct tracts of land, purchasing from the vendee, holding under a land contract, may join in an action for specific performance against the vendor.⁶

¹ *Belknap v. Trimble*, 3 Paige, 577.

² *Story's Eq. Pl.* §§ 533-539; *Gates v. Brossner*, 17 Wis. 455; *Morton v. Weil*, 33 Barb. 30; *Wall v. Fairley*, 73 N. C. 464.

³ *Horsh v. Morgan*, 1 Kan. 293.

⁴ *Ariz.* (1887) *Sta.* § 2283; *Cal.* (*Deering's C. & Sta.*) § 1195, *Col.* (1883) § 2152; *Dak.* (1887) § 5481; *Idaho* (1887), § 5137; *Ind.* (*Myer's An.*) § 5299; *Kan.* (*An.* 1889) §§ 4738, 4739; *Mo.* (1889) § 6713; *Neb.* § 2168; *Nev.* (*B. & H. Sta.* 1885) § 3819; *Okla.* (1890) § 3346; *Ore.* (*Hill's An.* p. 426); *Tex.* (*Sayres*, 1888), *Art.* 3179; *Utah* (*Com. Sta.* 1888), § 3818, *a.* 1069; *West Va.* (1891) p. 655; *Wis.* (1878) § 3321; *Wyoming* (*Sta.* 1887), § 1572.

⁵ *Whittemore v. Oil Co.* 124 N. Y. 565; *Lapping v. Duffy*, 47 Ind. 51.

⁶ *Owen v. Frink*, 24 Cal. 171.

SECTION III.

PARTIES DEFENDANT.

111. **The Code Provisions as to Parties Defendant.** — The sections of the codes prescribing rules are generally the following : —

1. "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the question involved therein."¹

2. "Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants ; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint or petition."²

3. "When the subject is one of common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."³

4. "Persons severally [and immediately, *Indiana*] liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes [whether the action is brought upon the instrument or by a party thereto to recover against other parties liable over to him, *New York*] ; and persons severally liable for the same demand [and, without reckoning offsets or counterclaims, in the same amount, although upon different obligations or instruments, *Wisconsin*], may all or any of them be included in the same action at the option of the plaintiff."⁴

¹ Code Ref. 14.

² Id. 11.

³ Id. 13.

⁴ Id. 61.

5. Some States have provisions allowing the landlord and tenant to be joined as defendants¹ in actions to recover real estate, or the landlord to be substituted for the defendant tenant.

112. Defendants in Actions on Contract. — Without entering into a full explanation of the doctrines of the former procedure as to parties defendant, which the limited space of this treatise will not permit, a few general rules may here be laid down as the result of the unchanged rules of the common-law and equity systems combined with code provisions.

1. *Defendant must be liable on Contract.* — No one can be sued for a breach of contract unless he is a party to it, or unless the liability thereon has devolved upon him by operation of law, or unless the law implies a contract obligation where none has in fact been made.

2. *Where several persons are jointly liable,* they must be jointly sued. The codes have provided for the frequent case where one or part of the joint contractors cannot be served with summons, being beyond the jurisdiction of the court. The action may proceed against those served. All the persons jointly liable are named as parties defendant, and the judgment is rendered *in form* against all, and is binding on joint property, but does not bind the defendants not served, until a subsequent proceeding brings them in, with opportunity to defend. There are, as there are at common law, several exceptions to this general rule above stated: (a) Where a co-contractor has been discharged as a bankrupt, or (b) where the Statute of Limita-

¹ Ark. §§ 2625; Cal. § 379; Col. § 266; Idaho, § 4102; Mo. § 1993; Mont. § 16; N. Y. § 1503; Ore. § 316; N. C. § 184; N. Dak. § 4878; Okla. § 4984; S. Dak. § 4878; Wis. § 3076; Wyoming. In Indiana (§ 1051), Iowa, Kansas, Oklahoma, and Oregon, the landlord may be substituted for the tenant defendant.

tions has run as to one or part of the defendants, those thus discharged need not be joined. (c) If one of the joint contractors is an infant or (d) a married woman, and the contract does not relate to or operate to charge her separate estate, and she is, as to the contract, still under the common-law disability, such infant or married woman need not be joined. (e) Dormant partners need not be joined. (f) Still other exceptions are made by statute in several States, where joint liabilities are declared to be joint and several; and one, any, or all of the joint obligors may be sued at the plaintiff's option.¹

3. *Where Parties are severally liable on Contract.*—While at common law a *right* can be joint or several, it cannot be joint *and* several.² But liabilities may be joint *and* several, and the plaintiff may sue one or all of those jointly *and* severally liable. But he must sue all jointly or all severally; he cannot sue part jointly and others severally.³ The code provision above quoted changes this rigid requirement:—

(a) Those jointly and severally liable may one, any, or all be united as defendants at the plaintiff's option.

(b) Those who are held in different relations of liability to the same contract—as the maker, drawer, acceptor, or indorser of negotiable bills of exchange or promissory notes—cannot at common law be joined as defendants, because, strictly speaking, their contracts are not identical. But this code provision very generally allows such parties to bills of exchange and promissory notes to be sued severally, or part or all to be joined, as the plaintiff may elect.⁴

¹ Code Ref. 65.

² *Slingsby's Case*, 5 Co. Rep. 19 a; *Eccleston v. Clepsham*, 1 Wm. Saund. 153; *Petrie v. Bury*, 3 B. & C. 353; 1 Chitt. Pl. 11; *Garrett v. Handley*, 4 B. & C. 664.

³ 1 Chitt. Pl. 43; *Cobell v. Vaughan*, 1 Wm. Saund. 291 e, f, n. 4; *Streatfield v. Halliday*, 3 T. R. 782.

⁴ Code Ref. 61-64.

(c) The above instances refer to liability on the same instrument. But in several of the States,¹ sureties for the same debt, or guarantors, liable for the same debt, though upon separate instruments, may be joined or not, as the plaintiff may elect.²

(d) In a few States "all persons holding as tenants in common, joint tenants, or co-parceners,* or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party [person or persons]."³

(e) Another small group of States are still more radical in their departure from ancient rules. They provide that persons liable on contract, whether jointly, jointly and severally, or severally only, may one, any, or all be sued, at the plaintiff's option. In case any so bound are dead, the survivors may all or any be sued, and the personal representatives of any or all the deceased obligors may be joined.⁴

113. Defendants in Actions ex delicto — General Rules as to Parties Defendant under the Code. — A few general rules of the common law which still obtain under the codes, respecting defendants in actions for tort, may be stated as follows:—

1. *Wrong-doer liable.*— Any person who has committed a wrong to the person or to property, whether the injury be done by force, or be the result of negligence, or want of skill, or fraud or deceit, is liable to be sued by the party injured. To this broad rule there are the exceptions, not proper to be considered here, that judges cannot be

¹ Code Ref. 61-64.

² Id. 62.

³ Id. 66.

⁴ Id. 65-67.

* NOTE. — The word "co-parceners" is, evidently by mistake, printed "co-partners" in the Nevada statute.

sued in private action for judicial misconduct, though actuated by evil motives, and the protection given to magistrates, sheriffs, constables, etc., who are sometimes exempt from liability, being protected by the process they are commanded to execute.¹

2. *Joint wrong-doers are liable jointly and severally*, and the party injured may at his option sue one, any, or all. But to expose them jointly, the *tort must be joint*. There must be community in the wrong-doing; it must be joint work.² For example, where B converts the goods of A and sells them to C, who in turn sells them to D, who also sells them to E, each subsequent purchaser having no knowledge of the original tort, each is liable. But their successive conversions do not constitute a joint conversion, and they cannot be jointly sued.³ Some torts, however, cannot be joint. Slander cannot be jointly committed, though the same words are spoken simultaneously by two or more. "The words of the one are not the words of the other."⁴ But most wrongs can be committed by two or more jointly. All persons who aid, counsel, or direct a trespass,⁵ or wrongful conversion,⁶ or other tort,⁷ are joint wrong-doers, and may be united as defendants. One who procures another to utter a slander would not be liable in an action for slander, but in an action for conspiracy to slander he could be joined.⁸

¹ See Cooley on Torts, pp. 477, 538-550.

² Trowbridge v. Forepaugh, 14 Minn. 133.

³ Nicoll v. Glennie, 1 Maule & Sel. 588; Wilbraham v. Snow, 2 Wms. Saund. 47 n.; Cooper v. Blair, 14 Ore. 255. But see Robertson v. Hunt, 77 Tex. 321.

⁴ Chamberlain v. White, Cro. Jac. 647; Webb v. Cecil, 9 B. Mon. 198; but see Bish. Non-Cont. Law, § 525.

⁵ Petrie v. Lamont, Car. & M. 96; Sprague v. Kneeland, 10 Wend. 161; Sikes v. Johnson, 16 Mass. 389; Page v. Freeman, 19 Mo. 421.

⁶ Wilbraham v. Snow, 2 Wms. Saund. 47 n.

⁷ Id.

⁸ Forsyth v. Edmiston, 2 Abb. Pr. o. s. 430.

3. *Joinder where the Tort arises out of Contract.* — A somewhat nice distinction is to be noted here. In the class of cases where the plaintiff may elect to sue in tort for malfeasance or non-feasance in the performance of a contract, — his action being “on the case” under former classification, — the rule seems to be: (a) If he sue an innkeeper or common carrier in tort for injury to person or goods, he may regard the action as founded on breach of duty, unconnected with the contract, and sue one, any, or all who are suable for the tort and jointly in fault.¹ (b) But if he sue *on the contract*, and in all cases where the action is not maintainable without referring to the contract, the persons jointly liable must be joined.²

4. *The principal and his agent* may be joined when the tort committed by the agent is one for which the principal is bound,³ or the principal may be held solely responsible, or the agent may be sued alone.⁴

5. *The master and servant* may be joined where the liability attaches to the master for the torts of the servant, whether from wilfulness or negligence.⁵

6. *Defendants in Ejectment.* — In actions to recover possession of real property, the codes usually provide — (1) That the actual occupant, if any, shall be made defendant; (2) That with him may be joined any one who claims title to the premises, such as the landlord, when a tenant is the occupant, or a reversioner or remainderman, where the tenant has but a particular estate; (3) If the premises are not occupied, then those claiming

¹ 1 Chitt. Pl. 87.

² 1 Chitt. Pl. 87; *Powell v. Layton*, 2 B. & P. N. R. 365; *Cobell v. Vaughan*, 1 Wms. Saund. 291 f.

³ *Hall v. Smith*, 2 Bing. 156; *Stevens v. Ry. Co.* 23 L. J. 328.

⁴ *Phelps v. Wait*, 30 N. Y. 78; *Wright v. Wilcox*, 19 Wend. 343; *Mechem on Agency*, § 571 n.

⁵ *Phelps v. Wait*, 30 N. Y. 78; *Bailey v. Bailey*, 61 Me. 361; 19 Wend. 243; 3 E. D. Sm. 591. *Contra*, in *Mass.* 592. See *Cooley on Torts*, 2 ed. p.

title or some interest therein, or exercising acts of ownership over the same.¹

7. *When Defendants cannot be joined.* — The defendants cannot be joined when their torts are each distinct and separate. Thus, if the cattle of A and B unite in breaking into the land of C, or if the dogs of A and B worry the sheep of B, or if A and B each commit a separate trespass on the lands of C, in none of the cases can A and B be joined as defendants in an action.²

8. *Infants liable for their Torts.* — An infant is liable for his own torts,³ when done in the absence of the parent, and without his authority.⁴ Where the parent is responsible for the act of the infant, by reason of having commanded it, or its having been done by the infant while acting in the employment of the parent, within the scope of his authority, the parent may be responsible, and parent and infant may be sued jointly.⁵

9. *Corporations liable for Torts.* — Corporations are liable for torts committed by them, through their agents and servants acting in the line of duty.⁶ Where fraudulent or malicious intent must be proved, the fraud or malice of the authorized agents will be imputed to the corporation.⁷ Hence, a corporation may be liable for libel,⁸

¹ Bliss's Ann. Code N. Y. §§ 1502-1503; Wis. R. S. Sta. §§ 3075-3076, and the codes of the other States, for various provisions as to separate trial, verdict, and recovery against defendants joined in ejectment.

² Cooley on Torts, p. 348 n.; Turner v. Hitchcock, 30 Ia. 310.

³ Bing. on Inf. 110; Huchting v. Engel, 17 Wis. 230.

⁴ Tift v. Tift, 4 Denio, 177; Baker v. Haldeman, 24 Mo. 219.

⁵ Schaefer v. Osterbrink, 67 Wis. 495; Hoverson v. Noker, 60 Wis. 513; and see Hogerty v. Powers, 66 Cal. 368; Poland v. Earhart, 70 Ia. 285.

⁶ Cook on Stock & Stockholders, § 697.

⁷ Id.; Vance v. Erie Ry. Co. 32 N. J. L. 334; Goodspeed v. Bank, 32 Conn. 530; Williams v. Ins. Co. 57 Miss. 759; Cragie v. Hadley, 99 N. Y. 131; Butler v. Watkins, 13 Wall. 456.

⁸ Penn. &c. R. Co. v. Quigley, 21 Hun, 202; Van Arnam v. Billstein, 102 N. Y. 355; Detroit, &c. Port Co. v. McArthur, 16 Mich. 447.

for assault and battery committed by its agents or servants in executing its rules, orders, etc.,¹ for a vexatious civil suit,² for trespass,³ for malicious prosecution,⁴ nuisance,⁵ conversion,⁶ or conspiracy.⁷

In all these cases the corporation may be sued alone, the agent or officer who commits the wrong may be sued alone, or the corporation and the officer committing the wrong may be jointly sued,⁸ upon the familiar principles fixing the liabilities of principal and agent.

114. Defendants in Actions of an Equitable Nature — Code Provisions.—The code provisions which have a more special bearing on actions of an equitable nature are the following:—

1. "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint (or petition)."⁹

¹ *Denver, &c. Ry. Co. v. Harris*, 122 U. S. 597; *Ramsden v. Boston, &c. Ry. Co.* 104 Mass. 117; *Crocker v. C. & N. W. Ry. Co.* 36 Wis. 657.

² *Goodspeed v. Bank*, 22 Conn. 530; *Wheless v. Bank*, 1 Bax. (Tenn.) 469.

³ *Mound v. Canal Co.* 4 Man. & Gr. 452; *Chicago, &c. Ry. Co. v. Davis*, 86 Ill. 20; *Blesch v. C. & W. Ry. Co.* 43 Wis. 183; *Mayor, &c. v. Bailey*, 2 Denio, 433.

⁴ *Vance v. Erie Ry. Co.* 32 N. J. L. 334; *Reed v. Savings Bank*, 103 Mass. 443, and cases cited in *Cook on Stock*, &c. § 698 n.

⁵ *Baltimore, &c. Ry. Co. v. Fifth Bap. Ch.* 108 U. S. 317; *Rorer on R. R.* pp. 705-708; *Story v. N. Y. El. Ry. Co.* 90 N. Y. 123, 178, 179, 43 Am. R. 146; *Terre Haute Gas Co. v. Teel*, 20 Ind. 131.

⁶ *Beach v. Bank*, 7 Cow. 485.

⁷ *Buffalo, &c. Oil Co. v. Standard Oil Co.* 106 N. Y. 669.

⁸ *Dicey on Parties*, 2d ed. 465, 466; *Stevens v. Midland R. Co.* 23 L. J., 10 Ex. 352.

⁹ *Code Ref.* 11.

2. "Any person may be made a defendant (a) who has or claims an interest in the controversy adverse to the plaintiff, or (b) who is a necessary party to a complete determination or settlement of the question involved therein."¹

The above are familiar principles in equity. The framers of the code, as they report, meant, in this, to borrow and adopt these well-settled equity rules and extend their application to actions of a legal as well as equitable nature.²

115. Necessary and Proper Parties. — There is in equity courts a distinction between *necessary* and *proper* parties, — between such as are indispensable to a decree and those who might very properly be parties, but without them a decree effectual for some purposes may be rendered.³

Illustrative Instances. — The general doctrine as to necessary and proper parties may be illustrated by a few instances of most frequent occurrence: In actions to fore-

¹ Code Ref. 14.

² N. Y. Rev. Stats. 1848, vol. iii. Appendix, p. 846.

³ "The general rule in Chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications in particular cases. The true distinction appears to be as follows: (1) Where a party will be directly affected by the decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule; (2) Where a person is interested in the controversy, but will not be directly affected by the decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached; (3) Where he is not interested in the controversy between the immediate party litigants, but has an interest in the subject-matter which may be conveniently settled by the suit, and thereby prevent further litigation, he may be made a party or not, at the option of the complainant." *Williams v. Bankhead*, 19 Wall. 563. See Story's Eq. Pl. § 76 c and note, for full discussion.

close mortgages the necessary parties are—(a) the owners of the land subject to the mortgage; (b) the persons personally liable for the mortgage debt, of whom a personal judgment, for deficiency after applying the proceeds of the foreclosure sale, may be demanded. These are necessary parties. (c) So, also, are the widow of a deceased mortgagor or subsequent purchaser,¹ when their dower right is affected. But if she have not joined in the mortgage, and it is not for the purchase-money, she need not be made a defendant, for the judgment cannot affect her rights. (d) Subsequent encumbrancers or lien-holders are very proper parties, but not indispensable. A valid judgment, as far as it goes, can be given without them, but still it is an incomplete one, as their right of redemption would be unaffected.² (e) A prior encumbrancer is not a *necessary* party; he is hardly a proper party, unless the question of priority is in dispute, or unless he consents to come in and have his rights adjusted and his claims satisfied.³

SECTION IV.

ACTIONS BY AND AGAINST HUSBAND AND WIFE.

116. *When Wife may sue alone.*—At common law the wife could not sue alone. As her personal chattels became upon marriage the property of the husband, he

¹ *Foster v. Hickox*, 38 Wis. 408. She is in Wisconsin deemed a *necessary* party if she joined in the mortgage, a *proper* party if she did not. *Cary v. Wheeler*, 14 Wis. 281. As to joinder of the wife, see *post*, p. 158.

² *Mooney v. Maas*, 22 Ia. 380; *Merchants' Bank v. Thomson*, 55 N. Y. 7, 11. But if made a party, and the complaint alleges facts showing her rights to be subject to the mortgage, she ought to defend, so that the judgment may not bar her upon default.

³ *Anson v. Anson*, 20 Ia. 55.

sued for them alone. Upon *choses in action*, which belonged to her at the time of marriage, or for rent due her, he might sue, but must join the wife as nominal plaintiff, though he reaped the fruit of the action. For injuries to her person or character during marriage, the husband must sue jointly with her. For injuries done to her real property during coverture, or for rent accruing during coverture, the husband might sue alone, or the wife might be joined.¹

In equity the husband must generally be joined with the wife; but she may sue the husband, and she then sues by guardian or next friend.

The codes and married women's Acts, enacted very generally in the United States, have swept away these arbitrary rules. Under the codes the wife may sue alone—(1) When the action concerns her separate property.² (2) When the action is between herself and her husband.³ In such actions she need not sue by guardian or next friend, save in two or three States.⁴ (3) For her earnings, in those States which allow the wife to have her own earnings,⁵ accruing from labor not performed for her husband. (4) When she carries on business in her own name because of the drunkenness, profligacy, or like inefficiency of her husband.⁶ (5) For injuries to her person or character in many of the States;⁷ in other code States the husband joins with her in such action.⁸ (6) By a few of the codes, the wife, whose husband has deserted her and the family, may bring actions which he might have brought.⁹ But this right rests only upon statute.¹⁰ (7) By several of the States she may take out insurance policy

¹ 1 Chitt. Pl. 28, 75.

² Code Ref. 23-37.

³ Id. 26.

⁴ Ohio, § 28; Neb. § 33. In Indiana (§ 8) she must sue by guardian if a minor.

⁵ Code Ref. 27.

⁶ Id. 26.

⁷ Id. 25.

⁸ Id. 34.

⁹ Id. 29.

¹⁰ Green v. Lyndes, 12 Wis. 404.

for her own benefit on the life of her husband, son, or other person, and sue upon the same as her own property.¹

(8) It is quite generally statute provision to allow the wife to sue alone who is living separate from her husband, in cases where otherwise she must join with him.² The statute usually reads in the above instances that the wife *may* sue alone. But this is merely permissive. She *may* join her husband with her in all these actions.³

117. When the Husband must join with the Wife as Plaintiff in suing.—In cases not mentioned in the foregoing paragraph, the wife and husband must join as plaintiffs. The instances in which they must join are the following: (1) Where they are united in interest in the subject-matter of the action.⁴ (2) Where the action is for injuries to her person or character, and no statute expressly gives her the right to sue alone.⁵ (3) They are permitted to join in some States in actions for injuries to her person, where she recovers the damages for her own sufferings, and the husband such damages as he suffers, for loss of society and service, expense, etc., by reason of her injury.⁶ But the usual rule is that such causes of action cannot be united.⁷ (4) Where the action is to recover land of the husband, and set aside a conveyance thereof which the husband and wife were by fraud induced to make, the wife may join by reason of her inchoate right

¹ An. Sta. Wis. § 2347; Ark. § 4623.

² Code Ref. 32.

³ Kennedy v. Williams, 11 Minn. 314; Gee v. Lewis, 20 Ind. 149; Corcoran v. Doll, 32 Cal. 82; Botkin v. Earl, 6 Wis. 393; Snell v. Bray, 56 Wis. 156.

⁴ Renihan v. Wright, 125 Ind. 536.

⁵ Johnson v. Dicken, 25 Mo. 580; Enders v. Beck, 18 Ia. 86; Renihan v. Wright, 125 Ind. 536.

⁶ Code Ref. 34.

⁷ Barnes v. Martin, 15 Wis. 240; Kavanaugh v. Janesville, 24 Wis. 618; Smith v. St. Joseph, 55 Mo. 456.

of dower.¹ (5) Where a conveyance is void as to the wife, and a cloud upon her inchoate right of dower, she and her husband may join in an action to remove such cloud.²

118. The Wife may or must be Sued alone, when —

(1) The action concerns her separate property or business,³ she may be sued alone. (2) Her husband is the plaintiff,⁴ she must be sued alone. (3) In most of the States, for her antenuptial debts, the husband is not liable, and should not be joined.⁵ (4) In part of the States, for her own torts, not committed with, in presence of, or by coercion of, her husband, she must be sued alone.⁶

119. The Husband and Wife must be jointly sued. —

(1) When they are united in interest in the property or right which is the subject of the action.⁷ (2) For the torts of the wife, unless by some statute she is made solely liable.⁸ (3) Generally, in all cases where no statute expressly authorizes her to be sued alone. (4) Under some of the codes, which followed the New York code, as first adopted, the provision was: "When a married woman is a party, her husband *must* be joined with her, except that when the action concerns her separate property she may *sue* alone." The courts held, while this provision was the law, that in all actions where she was sued

¹ *Simar v. Canaday*, 53 N. Y. 298. *Contra*, *Read v. Lang*, 21 Wis. 678. But see *Madigan v. Walsh*, 22 Wis. 478.

² *Madigan v. Walsh*, 22 Wis. 478.

³ Code Ref. 24.

⁴ *Id.* 26.

⁵ See State statutes.

⁶ Code Ref. 37 a.

⁷ *Id.* 11.

⁸ See *ante*, p. 146. In Wisconsin the husband is made a party with the wife; but execution can issue only against her separate property. S. & B.'s Ann. Stats. 2969 a; Laws, 1883, c. 25. In Wyoming the judgment is levied of the wife's estate, if she have any. R. S. § 1565.

respecting her property, her husband must be joined.¹ (5) In actions of tort in respect to her property, or property claimed by her,² such as nuisances thereon, imperfect fences, and cases of omission of duty relating thereto,³ or liability because of ownership, or trespasses by her animals,⁴ she must generally now be sued alone, as most of the States have changed the above code provision, so as to require that she be sued alone in actions respecting her separate property.⁵ (6) In actions to foreclose a mortgage executed by the husband upon his lands, the wife, being dowable, is a necessary party — (a) if she has joined in the mortgage; or (b) if the mortgage was given before her marriage; or (c) if the mortgage is for the purchase-money. In all these cases she must be made defendant, so as to cut off her dower interest in the mortgaged premises. But if the mortgage was executed by the husband while she was wife, and she did not join in it, her dower interest is unaffected by the mortgage and by the decree. In such case it is useless to make her a party.⁶

SECTION V.

120. One or more Suing or being Sued in Behalf of all interested : *When One may sue or be sued as the Representative of a Class.* — The codes adopt a rule of equity,

¹ *Oatman v. Goodrich*, 15 Wis. 589 (the Wisconsin statute since changed); *Wolf v. Manning*, 3 Minn. 202; *Mavrick v. Green*, 3 Nev. 52.

² *Peak v. Lemon*, 1 Lans. 296; *Warren v. Warren*, 46 N. Y. 228.

³ *Rowe v. Smith*, 45 N. Y. 230.

⁴ *Baum v. Mullin*, 47 N. Y. 577.

⁵ Code Ref. 23-29.

⁶ See on this subject, *Wiltie on Foreclosure*, § 135, and cases cited.

which is founded in convenience, that, "when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole."¹ There are three classes of cases embraced within this rule: (1) Where the question is one of a common or general interest, and one or more sue for the benefit of all; (2) Where the parties are a voluntary association for public or private purposes, and those who sue or defend represent the rights and interests of the whole; (3) Where the parties have distinct interests or rights, but are so numerous that it is impracticable to bring them all before the court.²

1. *Cases of a Common or General Interest.*—Where the question is one of common or general interest the parties need not be so numerous as to render it impracticable to bring them all in. The parties need not be in privity; but the case must be one in which all could have joined in the first instance. This is said to be the test by which to determine that the action is properly brought by one for all.³ This provision applies to actions of a legal as well as an equitable nature, but is most usual in equitable actions.

2. *Numerousness of Parties.*—In cases where one or more are allowed to sue or defend in behalf of all, because the parties are so numerous as to render it impracticable to bring them all in, it is not essential that their interests be joint. The right of each may be distinct, though all must be interested in the relief sought. To entitle the suit to be brought by a representative because the parties are numerous, it must be shown by the complaint that they are numerous, and the mere general allegation of the fact is

¹ Code Ref. 13.

² Story's Eq. Pl. §§ 98-135.

³ Reid v. Evergreens, 21 How. Pr 319.

insufficient.¹ In one case the number of twenty² was held insufficient; in another thirty-five;³ in another forty,⁴—too few to justify one suing for all.

3. *Illustrative Instances.*—The more common instances where one or part may sue or defend for the benefit of all are: (1) Creditors seeking to establish their claims against a common debtor and set aside fraudulent conveyances or reach equitable assets;⁵ (2) Legatees or distributees of an estate suing for an accounting;⁶ (3) Voluntary associations of unincorporated persons, societies, etc.;⁷ (4) Part of a prize-crew, suing a prize agent for an accounting;⁸ (5) Share-holders in a corporation suing directors for neglect or misconduct.⁹ (6) Tax-payers may sue, one or part for all, to restrain delivery of municipal bonds unlawfully issued in aid of a railroad,¹⁰ or to restrain municipal officers or corporations from violating their legal duties or transcending their powers to the injury of the tax-paying inhabitants.¹¹ (7) Policy-holders may, one or part for all, sue to compel officers to declare a dividend.¹² (8) A tradesman or artisan may sue in behalf of all of his class in a particular locality to restrain illegal acts preju-

¹ *Hobicht v. Pemberton*, 4 Sandf. 657.

² *Harrison v. Stewardson*, 2 Hare, 530.

³ *Kirk v. Young*, 2 Abb. Pr. 453.

⁴ *Brainerd v. Bertram*, 5 Abb. N. C. 102.

⁵ 1 Dan. Ch. Pl. p. 235.

⁶ *Story's Eq. Pl.* §§ 104–106; *McKenzie v. L. Amouroux*, 11 Barb. 516.

⁷ *Story's Eq. Pl.* § 107 *et seq.*

⁸ *Id.* § 98.

⁹ *Smith v. Rath*, 66 Barb. 402. But see *Dousman v. Wis. etc. Co.* 40 Wis. 418.

¹⁰ *Lynch v. Eastern, etc., Co.* 57 Wis. 430, and cases cited.

¹¹ For a large collection of cases where tax-payers may sue in equity, see *Dillon on Municipal Corporations*, 4th ed. § 914 and note. The diversity of ruling in the different courts is there shown. See, also, 57 Wis. 430, 58 Wis. 565.

¹² *Luling v. Atl. Mut. Ins. Co.* 45 Barb. 510; 30 How. Pr. 69.

dicial to their calling.¹ (9) Pew-holders or members of a congregation,² parishioners,³ a partnership of five hundred members,⁴ share-holders in a fund,⁵ are such a class that one or more may sue or defend for all as having a common interest.

121. The persons thus represented derive the benefit of the action only by coming in and being made parties, or by sharing expenses of litigation — (a) if the action be one where the fruits of the recovery are to be shared or divided, or where each person is to be brought under the operation of the judgment. (b) But in some cases, — as, for example, the restraining of a public officer from doing some illegal act, — all may derive the benefit, though never brought in nor connected with the action by contributing or sharing in its conduct.⁶ The party who institutes the action may settle his individual claim and discontinue at any time before other parties have come in; but after judgment it is for the benefit of all; and he cannot control the action.⁷

SECTION VI.

BRINGING IN NEW PARTIES: INTERVENTION; INTERPLEADING.

122. The Code Provisions. — The codes very generally contain this provision: (1) “The court may determine

¹ *Smith v. Lockwood*, 10 N. Y. Leg. Obs. 12, 232; *Eickleberg v. Board of Health*, 47 Hun, 371.

² *Milligan v. Mitchell*, 3 Myl. & Cr. 72, 84.

³ *Bromley v. Smith*, 1 Sim. 8. ⁴ *Small v. Atwood, Younge*, 407.

⁵ *Adair v. New River Co.* 11 Ves. 443.

⁶ See *Story's Eq. Pl.* §§ 99, 106. As to equity practice in advertising to bring parties in who ought to be joined and receive their benefit or be bound by judgment, see *David v. Frowd*, 1 M. & K. 200.

⁷ *Brinckerhoff v. Bostwick*, 99 N. Y. 185.

any controversy between the parties before it, where it can be done without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court may cause them to be brought in."¹ (2) And when in an action for the recovery of real or personal property a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment. (3) A defendant against whom an action is pending upon a contract, or for specific real or personal property (or the conversion thereof, *in Wisconsin*), may, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in the court the amount of the debt or delivering the property or its value to such person as the court may direct; and the court may in its discretion make the order."² (4) In Iowa, any stranger may intervene, on his own motion, without leave of court.³ In California⁴ and Washington⁵ the same is true, save that the intervenor must first obtain leave of the court.

123. The bringing in of new parties, when a complete determination cannot be had without their presence, is an old, familiar practice in equity. It will be observed that they need not be brought in, when the rights of the

¹ Code Ref. 84.

² Code Ref. 69. The above is the language or substance of all the codes save those mentioned below.

³ Ia. § 2683-2685.

⁴ Cal. § 4946.

⁵ Wash. § 156.

parties before the court can be determined, or their rights saved; but if their rights are so bound up with those of the parties in court that the latter cannot be settled and adjusted without also fixing and settling the former, then the court *must* order them brought in.¹ The court acts of its own motion, if neither party to the record raises the question. The persons may be ordered in at any stage in the action,² even after appeal.³

124. Intervention. — The instances in which a party may intervene are quite limited, — except in a few States. They are confined to actions for the recovery of real or personal property.⁴ But in the States above named, they may come in in any action where they have an interest in the subject-matter, or in the success of the parties, or against both.⁵ The action then becomes tripartite. In garnishee or attachment proceedings the right of interpleader and intervention is usually provided for by statute, to enable third parties to assert their claims to the property bound in attachment or garnishment.⁶

125. Interpleader. — The code method is a substitute for, and simpler procedure than, the bill of interpleader in equity, of which mention has been made in the earlier part of this volume.⁷ It applies to three kinds of actions: (1) Those to recover money on contract; (2) To the action to recover specific real property, commonly called “ejectment,” though very unlike the ancient action of that name; (3) The action to recover specific personal property, com-

¹ *Davis v. The Mayor, etc.*, 2 Duer, 663, 3 Duer, 119; *Shaver v. Brainard*, 29 Barb. 25; *Jones v. Vantress*, 23 Ind. 533; *Johnson v. Neville*, 68 N. C. 177.

² *Atty.-Gen. v. Mayor*, 3 Duer, 119.

³ *Shaver v. Brainard*, 29 Barb. 25.

⁴ Code Ref. 79-83.

⁵ *Id.* 82.

⁶ *Id.* 83.

⁷ *Ante*, par. 44, p. 52; par. 48, p. 56

monly called "replevin;"¹ (4) In Wisconsin, it also may be applied in an action for the conversion of personal property.²

126. The pleadings must be amended when new parties are ordered brought in, or intervene, or interpleaded. The complaint will be dismissed as to them on the trial, unless it is amended so as to show them to be properly parties of record.³

SECTION VII.

MANNER OF RAISING QUESTION AS TO PARTIES TO ACTION.

127. Non-joinder of Parties Plaintiff, how called in Question.—The codes uniformly provide that for "defect" of—that is, too few—parties, the defendant may raise the objection by (a) demurrer, when the defect appears upon the face of the complaint or petition,⁴ or (b) by answer, when it does not so appear.⁵ If the defect is apparent on the face of the complaint or petition, the defendant must raise the point, if at all, by demurrer. He cannot in that case raise it by answer. If it be not so apparent, he must object by answer, or he waives the objection altogether. Being in its nature a dilatory defence, the defendant renounces it, if he do not raise it at the proper time and in the proper manner.⁶ The

¹ Code Ref. 69–78.

² S. & B.'s Ann. Sts. 2610; Laws, 1883, c. 41.

³ Smith v. Weage, 21 Wis. 440. As to amendment of pleadings generally, see *post*, pp. 278–287.

⁴ Code Ref. 132.

⁵ Id. 141.

⁶ Zabriskie v. Smith, 13 N. Y. 322; Haines v. Hollister, 64 N. Y. 1; Tennant v. Pfister, 45 Cal. 270.

demurrer for defect of parties plaintiff should point out the particular defect by showing the party who should be made co-plaintiff.¹ He must appear by the complaint to be living at the time, or the objection must be taken by answer.² And where the defendant sets up in his answer the defence of non-joinder, he must state the names and residences of the persons whom he alleges to be necessary plaintiffs.³

128. Misjoinder of Plaintiffs.—If there be an excess of plaintiffs, it is made ground for demurrer by statute in part of the code States and Territories.⁴ Where no such statute has been passed, the rule is that a misjoinder or excess of plaintiffs is not ground for demurrer.⁵ To this general rule there is the exception that when a wife is misjoined as plaintiff with her husband, the defendant may demur,⁶ because a several judgment cannot be given against the wife at the trial.

Where by statute the misjoinder of plaintiffs is made ground of demurrer, when apparent on the face of the

¹ *Gardner v. Fisher*, 87 Ind. 369; *Baker v. Hawkins*, 29 Wis. 576.

² *Brainard v. Jones*, 11 How. Pr. 569; *Levi v. Haverstick*, 51 Ind. 236.

³ *Gardner v. Fisher*, 87 Ind. 369; *Bevier v. Dillingham*, 18 Wis. 529, 534; but see *contra*, *Sullivan v. N. Y. &c. Co.* 119 N. Y. 348. The presumption of life applies, *Eaton v. Balcom*, 33 How. Pr. 80, where the defect is made ground of demurrer. See Bliss' Ann. Code, N. Y. § 500 n.

⁴ Code Ref. 137, 138.

⁵ *McIntosh v. Ensign*, 28 N. Y. 109, for rule prior to the change in the statute so as to make misjoinder ground of demurrer, *Dean v. English*, 18 B. Mon. 132; *Fry v. Street*, 37 Ark. 39; *Hill v. Marsh*, 46 Ind. 218; *Schiffer v. Eau Claire*, 51 Wis. 385; *Hoard v. Clum*, 31 Minn. 186; *Clark v. Bayer*, 32 Ohio St. 311; *Burns v. Ainsworth*, 72 N. C. 496; *Kucera v. Kucera*, 86 Wis. 416, and cases cited.

⁶ *Read v. Sang*, 21 Wis. 678; *Dunderdale v. Grymes*, 16 How. Pr. 195

complaint, it may be taken by answer when it does not so appear.¹

129. Non-joinder of Defendants.— Where there is a “defect” of parties defendant manifest upon the face of the complaint or petition, it is ground for demurrer in all the codes; and for objection by answer, when not shown on the face of the plaintiff’s pleading. The same rules obtain as the necessity of demurring when the objection appears on the face of the complaint, and pointing out the defect by indicating the person who should be made a defendant, as in case of non-joinder of plaintiffs.²

130. Misjoinder of defendants means, not that all the defendants are improperly sued, but that some one or more are properly sued, and others improperly joined. As to this objection, the following is to be remarked:—

1. In most of the codes, the misjoinder of one or more defendants is not ground of objection to be taken by those who are properly sued.

2. But those who are improperly joined may separately demur, not on the ground of misjoinder, but because the complaint or petition, as to them, states no cause of action.³

3. A joint demurrer interposed by those properly sued and those improperly sued will be overruled in those States whose statutes do not make misjoinder of defendants a ground of demurrer, if a cause of action is stated against any of the defendants.⁴

¹ Code Ref. 137, 141.

² Id. 134.

³ *Lewis v. Williams*, 3 Minn. 151; *Nichols v. Drew*, 94 N. Y. 22; Pom. Rem. § 291, and cases in note.

⁴ *Brown v. Woods*, 48 Mo. 330; *Webster v. Tibbitts*, 19 Wis. 438; *McGonigal v. Colter*, 32 Wis. 614. *Contra*, *Wood v. Olney*, 7 Nev. 109.

4. Those who are improperly sued can at any stage of the action object that there is no cause of action alleged in the complaint against them. They may at or before the trial move to dismiss the action as to them; and they are entitled to judgment of dismissal with costs against the plaintiff, even though he may recover against the defendants properly sued.¹

5. The plaintiff at any time may move to amend by striking out the name of the party improperly joined, or to discontinue the action as to such defendant.²

6. In some of the States where *misjoinder* is made ground for demurrer, it must be made by those who are improperly joined.³

¹ Code Ref. 136.

² Id. 309.

³ *Brown v. Woods*, 48 Mo. 330; *Alnutt v. Leper*, 48 Mo. 319; *Pfister v. Dasey*, 3 West. Coast Rep. 303.

CHAPTER V.

JOINDER OF CAUSES OF ACTION IN PLEADING.

131. **What Causes may be joined.** — Part of the codes, following the original New York statute, provide, that “the plaintiff may unite in the same complaint (or petition) several causes of action, whether they be such as have heretofore been denominated legal or equitable, or both, when they all arise out of— (1) the same transaction, or transactions connected with the same subject of action; (2) contract express or implied; (3) injuries with or without force to person or property or either; (4) injuries to character; or (5) claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; (6) claims to recover personal property, with or without damages for the withholding thereof; or (7) claims against a trustee by virtue of a contract, or by operation of law.”¹

But the causes of action so united must (a) all belong to one of these classes, and (b) must affect all parties to the action, and (c) not require different places of trial, and (d) must be separately stated.²

¹ Code Ref. 109–117.

² The codes are somewhat variant in phraseology on the subject of joinder. The States of Wisconsin, Ohio, Minnesota, Nebraska, Kansas, Florida, North Carolina, South Carolina, are substantially as above given. Indiana, Kentucky, California, Oregon, and Nevada omit the clause, “whether heretofore denominated legal or equitable, or both,” and the clause, “arising out of the same transaction or

132. What is a Cause of Action.—The proper understanding of these statutes requires a careful definition of

transactions connected with the same subject of action." Code Ref. 109-117.

Indiana (§ 278) classes the cases that may be united thus: (1) Money demands on contract; (2) Injuries to property; (3) Injuries to person or character; (4) Claims to recover personal property, with or without damages for withholding thereof, and for injuries to property withheld; (5) Claims to recover real property, with or without damages for the withholding thereof, and rents and profits of the same; and for waste or damage done to the lands; to make partition thereof, and to determine and quiet title; (7) Claims to foreclose mortgages; to enforce or discharge specific liens; to subject to sale real property upon demands against decedent's estates, when such property has passed to heirs, devisees, or their assigns; to marshal assets, and substitute one person to the right of another; and all other causes arising out of a contract or a duty. Recovery of title papers or other instruments in writing, or correction of mistakes therein, may be had in a separate action, or in other actions when essential to complete remedy; and in actions on contract, other matters may be joined when necessary to complete remedy and speedy satisfaction of the judgment, though such matters fall within some other one or more of the foregoing classes.

The Iowa code (§ 2630) comprehensively provides: "Causes of action of whatever kind, where each may be prosecuted by the same kind of proceedings, provided that they be by the same parties, and against the same party in the same right, and if suit on all as to venue may be brought in the same county, may be joined in the same petition. But the court, to prevent confusion, may direct all or any portion of the issues so joined therein to be tried separately, and may determine the order thereof."

In New York, the later revision (Code Prac. § 484; Bliss's Ann. Co. § 484) changes the classification thus: (1) Upon contract express or implied; (2) For personal injuries, except libel, slander, criminal conversation, or seduction; (3) For libel or slander; (4) For injuries to real property; (5) Real property, in ejectment, with or without damages for the withholding thereof; (6) For injuries to personal property; (7) To recover chattels, with or without damages for the taking or detention thereof; (8) Upon claims against a trustee by virtue of a contract, or by operation of law; (9) Upon claims arising out of the same transaction, or transactions connected with the same subject of

its terms. What is a cause of action? Jurists have found it difficult to give a proper definition.¹ It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be — (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property. The cases of the latter class are — such as the action to construe a will, so that the executor may execute it; or a trustee's action for directions as to the performance of his trust; or actions to quiet title; or actions or suits *quia timet* (because he fears) generally. A cause of action differs from a *chose in action* in this: the *chose in action* is a right to have money or some other thing, but it may not be due until

action, and not included within one of the foregoing subdivisions of this section.

“But it must appear upon the face of the complaint, that all the causes of action so united belong to one of the foregoing subdivisions of this section; that they are consistent with each other, and, except as otherwise provided by law, that they affect all parties to the action; and it must appear on the face of the complaint that they do not require different places of trial.”

The Oregon code abolishes only the distinction between forms of actions at law, and makes two classes of injuries, — one to person, and one to property (§ 1).

Colorado specifies three classes as unitable, namely: (1) Actions for the recovery of real property, with damages, rents, profits, etc.; (2) Actions for the recovery of personal property, with damages, etc.; (3) All actions for damages, whether upon contract or for injuries to property, person, or character. (Rice's Co. § 70.)

¹ Veeder v. Baker, 83 N. Y. 160.

sometime in the future. The facts of the *chose in action*, and the violation of plaintiff's right by non-performance on the part of the promisor, constitute the cause of action.

The cause of action must not be confounded with the *remedy* or *remedial right*. The remedy is the "object of the action," the relief sought by it; the remedial right is the secondary right to have such remedy which arises when the primary right is broken.

133. The Cause of Action is a Unit.—The state of facts may give right to two or more kinds of relief or remedy, — one legal and one equitable, — or different kinds of legal relief, or different kinds of equitable relief; but it is nevertheless but one cause of action; hence it cannot be *split*. "Splitting a cause of action" is defined to be a splitting up a demand and prosecuting it piecemeal, or presenting only a part of it, as the grounds upon which relief is sought, leaving the rest for a second suit.¹ "All damages arising from a single wrong, though at different times, make but one cause of action; and all debts and demands already due by the same contract make but one entire cause of action."² "In case of torts, each trespass, or conversion, or fraud, gives a single cause of action, and but a single one, however numerous the items of wrong or damage may be. In respect to contracts, express or implied, each contract affords one, and only one, cause of action. The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken, before the time of the performance of the others."³

¹ *Stark v. Starr*, 94 U. S. 485; *Bliss' Ann. Code*, § 481.

² *Bendernayle v. Cocks*, 19 Wend. 207; *Secor v. Sturgis*, 16 N. Y. 548.

³ *Secor v. Sturgis*, 16 N. Y. 548; *Fish v. Tank*, 12 Wis. 276, 298.

134. Causes of Action arising out of the Same Transaction.—The word “transaction” has no technical meaning in the law, and its use in this statute has led to some perplexity. The courts have not attempted to give an exact, comprehensive definition, but have merely construed it with reference to the cases before them. In common speech a transaction is the act of transacting any business, negotiation, management, or proceeding.¹ It is a broader term than “contract.”² Two or more contracts, or contracts and torts,³ or two or more torts,⁴ may arise out of the same transaction. A transaction, as the word is here used, is a combination of acts and events, circumstances and defaults, from which may result the violation of different and distinct primary rights of a person. The statute is liberally interpreted; and all the wrongs that a party has sustained in one transaction, whether from breaches of contract, torts, frauds, or breaches of trust, may be redressed in one action.*

¹ Worcester's Dic. “Transaction.”

² Roberts v. Donovan, 70 Cal. 113; Xenia Bank v. Lee, 7 Abb. Pr. 389.

³ Gertler v. Linscott, 26 Minn. 82.

⁴ Barr v. Shaw, 10 Hun, 580; Young v. Young, 81 N. C. 91.

* NOTE.—A few decisions will better illustrate the application of this statute than any definition the courts have attempted to give. In the following instances causes of action were held to be unitable, as arising out of the same transaction: for recovery of possession of land, and the value of the use and occupation (*Armstrong v. Hinds*, 8 Minn. 254); for accounting, payment of balance due, and surrender up of securities (*Montgomery v. McEwen*, 7 Minn. 351); for accounting by an administrator, and to set aside a conveyance made by him in fraud of the heirs, and compel a reconveyance by the heirs of the fraudulent grantee (*Bassett v. Warner*, 23 Wis. 673); for accounting by an agent, and to set aside conveyances of lands purchased with plaintiff's money and conveyed to the co-defendant (*Blake v. Van Tilborg*, 21 Wis. 679). So, causes of action arising from breach of a contract, and injuries to

135. Transactions connected with the Same Subject of Action.—The meaning of the provision of the statute above quoted, that causes of action may be united when they arise out of “transactions connected with the same subject of action,” is not yet fully fixed and accurately defined by decision.* In view of the decided causes where joinder has been sustained, it may be said—

1. That different causes of action may be united in the same complaint, when they arise out of transactions connected with the same subject of action.

property, the subject of the contract, as for delay in printing a book and injury to the stereotype plates left with the printer for the purpose (*Badger v. Benedict*, 1 Hilton (N. Y.), 414); causes of action for deceit in sale of canal-boat, and for wrongful taking of property from the boat (*Cleveland v. Barrows*, 59 Barb. 364); for injuries to person and property by the wrongful acts of a steamboat company to a passenger on the same voyage (*Jones v. Cortes*, 17 Cal. 487); to recover an agreed price, and for damages for delay in having the premises ready in time for the work to go on, the price of extra materials, and finally to set aside an award of matters in dispute arising out of the building contract, on the ground of fraud (*See v. Partridge*, 2 Duer, 463); to recover damages for conversion by common carrier of goods, and moneys mistakenly paid as freight for same goods (*Adams v. Bissell*, 28 Barb. 382); for moneys delivered to defendant as agent to buy land, part of which he had converted to his own use, and to compel him to convey to plaintiff the land bought with part (*Callaghan v. McMahan*, 33 Mo. 111).

In *Harris v. Avery*, 5 Kan. 146, A. called H. a thief, arrested and threw him in jail on a false charge of horse-stealing. This joinder was sustained. A contrary ruling is found in *Anderson v. Hill*, 53 Barb. 238, where it is held that assault and battery cannot be joined with slander.

* NOTE.—This subject is quite elaborately discussed in Pomeroy's *Remedies and Remedial Rights*, §§ 463–475. After criticising several decisions, in which a construction of the statute is attempted, he reaches the conclusion that no explicit and definite rule can be given; and that the statute can have no practical application to legal causes of action, but can be resorted to in practice only in suits of an equitable nature involving complicated matters.

2. That by the "subject of the action" is meant the things real or personal—lands, money, or chattels—in relation to which the action is brought.

3. That the transactions may be different, but must be connected with the subject of the action.

4. That the intention of the provision is to preserve the doctrine of equity, that all matters relating to one subject-matter, or subject of action, which ought to be settled and determined in one litigation, and can be joined as affecting all the parties in the same right and full relief given, may be united.

5. That in many instances it will be difficult to determine whether a case involves the statement separately of two causes of action, or whether it is one cause of action to be stated as such in continuous narrative.¹

6. When causes are united which can only be joined because they arise out of the same transaction, or transactions connected with the same subject of action, the facts showing such common origin or connection must be averred to enable the court to see that the joinder is proper.²

7. The connection must "be immediate and direct, and something that the parties can be assumed to have contemplated in their dealings with each other."³

¹ In *Whetstone v. Beloit, &c. Co.* 76 Wis. 613, the action was for damages for personal injuries received by an employee, and facts were alleged showing a receipt fraudulently obtained releasing the defendant from liability, and praying its cancellation. This was held the statement of only one cause of action, the cancellation of the release being simply ancillary to the action. In *Damon v. Damon et al.*, 28 Wis. 510, the complaint set up causes for divorce, also prayer for alimony, and alleged that defendant had conveyed his property to a third party, co-defendant, in fraud of her rights, and prayed that the deed be set aside. This was held but one cause of action. See also, in illustration of same unity of cause of action, *Moen v. McKnight*, 54 Wis. 551.

² *Flynn v. Bailey*, 50 Barb. 73.

³ Pom. Rem. § 794, and cases cited in note.

136. Must affect all Parties.—The codes generally require that the causes joined in the same complaint must affect all parties to the action.¹ The parties must be affected in the same right, and not in different capacities. One cannot sue in his individual right and his right as executor, administrator,² or trustee;³ nor can he be so sued by joining different causes of action against him.⁴ And manifestly A and B cannot join in one complaint a several cause of action in favor of A with one in favor of B;⁵ nor can a joint cause of action in favor of A and B be joined with a several cause in favor of either.⁶ Nor can a cause of action against all defendants jointly be

¹ Code Ref. 120.

² *Ferrin v. Myrick*, 41 N. Y. 315; *Hall v. Fisher*, 20 Barb. 441.

³ *Smith v. Goertner*, 40 How. Pr. 185; *Benjamin v. Taylor*, 12 Barb. 328; *French v. Salter*, 17 Hun, 546.

⁴ *Austin v. Munro*, 47 N. Y. 360; *McLaughlin v. McLaughlin*, 16 Mo. 242; *contra*, *Bank v. McFeely*, 61 Barb. 522.

⁵ *Grant v. McCarthy*, 38 Ia. 468; *Lull v. Imp. Co.* 19 Wis. 100; *Greene v. Nunnemacher*, 36 Wis. 50; *Leavenworth &c. R. R. Co. v. Wilkins*, 26 Pac. (Kan.) 16.

⁶ *Dailey v. Houston*, 58 Mo. 361, 366.

* **NOTE.**—The exception to this doctrine is found in some statutes, heretofore mentioned, which allow different lien-owners to unite their claims in one action to enforce the liens against the property subject to the lien. *Ante*, p. 144. It is also a familiar rule in equity that persons having different demands secured by lien or mortgage on the same property may unite their claims in one action (Story's Eq. Pl. §§ 533, 534), where the general objects of the bill will be promoted by such joinder. In New York the statute excepts actions for foreclosure from this rule, that the action must affect all parties; but the provision is unnecessary, being merely declaratory.

This doctrine must be understood as harmonizing with the rule that persons having separate and distinct interests, but a common interest in the relief sought, may unite in the action. In such case it is not a uniting of different causes of action, but a cause of action exists in favor of all for the common relief to which they are entitled.

united with one against one or some less than all severally;¹ nor one against A alone with one against B alone.² But in actions of an equitable nature it is not requisite that the causes of action affect all parties equally and in the same manner.³ The causes of action must affect all parties plaintiff as well as parties defendant.⁴

137. Causes of Action must be separately stated. — When two or more causes of action are unitable they must be separately stated.⁵ This the codes uniformly require, as it is necessary to enable the defendant to demur or answer to each separately, and thus avoid a confusion of the issues. Each statement must be complete in itself, containing all the facts which constitute the cause of action embraced in it; and defects or omissions in one cannot be supplied or helped out by statements in other counts or causes of action in the same pleading.⁶ But matters of inducement which precede the statement of the causes of action may apply to all of them without being repeated;⁷ and matter of inducement stated in the first count may be referred to in others following, and made part of them by reference.⁸ Such introductory usually embraces description of the character or capacity in which the party sues or is sued, etc. The aggregate of damages, however, may

¹ *Barnes v. Smith*, 16 Abb. (N. Y.) 420; *Wells v. Jewett*, 11 How. Pr. 242; *Hoffman v. Wheelock*, 62 Wis. 434.

² *Berg v. Stanhope*, 43 Minn. 176; *Turner v. Duchman*, 23 Wis. 500.

³ *Vermeule v. Beck*, 15 How. Pr. 333.

⁴ *Dailey v. Houston*, 58 Mo. 361; *Harsh v. Morgan*, 1 Kan. 293; *Schultz v. Winter*, 7 Nev. 130.

⁵ Code Ref. 121.

⁶ *Clark v. Featherstone*, 32 Ind. 142; *Curtis v. Moore*, 15 Wis. 134; *Abendrath v. Boardley*, 27 Wis. 555; *Wheeler v. Hall*, 41 Wis. 447; *Bronson v. Markey*, 53 Wis. 98; *Barlow v. Burns*, 40 Cal. 351.

⁷ *Curtis v. Moore*, 15 Wis. 134; and *see post*, p. 200; 1 Chitt Pl 423.

⁸ *Id.*

be alleged and demanded at the close or end of the complaint.¹

In several of the code States the statutes borrow a feature of the civil-law system of pleading by requiring the cause of action to be stated in separate paragraphs, and these numbered.² This system has its advantages, and may properly be adopted, independently of statute. The complaint may number each cause of action, and also each paragraph stating an issuable material fact.

138. Stating the Same Cause of Action in Different Counts.—As has been observed, the former system of pleading at common law allowed the plaintiff to set forth the same cause of action in different counts. The code system does not contemplate such repetition; but the rule requiring but a single statement is founded in convenience, and is not inflexibly enforced. Departure from it has been allowed when the exact nature of the legal right of the plaintiff and the defendant's liability depended upon facts in the defendant's possession which could not be developed until the trial; and in such cases the plaintiff is not put to election which cause of action he will stand upon.³ In most of the States the courts permit the common-law common counts in assumpsit to be used in actions upon promises⁴ instead of the facts creating the liability. But the few decisions which are opposed to this strong current of authority present reasons that are cogent and in harmony with the theory of the reformed system of pleading.

¹ *Spears v. Ward*, 48 Ind. 541.

² Code Ref. 122.

³ *Whitney v. R. R. Co.* 27 Wis. 327, 340-344; *Jones v. Palmer*, 1 Abb. Fr. 442; *Stearns v. Dubois*, 55 Ind. 257; *Van Brunt v. Mather*, 48 Ia. 503; *Wilson v. Smith*, 61 Cal. 209.

⁴ *Green v. Gilbert*, 21 Wis. 395; *Grannis v. Hooker*, 29 Wis. 65. An extensive array of authority upon this point is found in *Pomeroy's Remedies*, &c., § 542 n. *Contra*, *Foerster v. Kirkpatrick*, 2 Minn. 210; *Bowen v. Emmerson*, 3 Ora. 452. See *Bishop v. Ry. Co.* 67 Wis. 610

PART II

CHAPTER VI.

OF CODE PLEADINGS.

SECTION I.

OF CODE PLEADINGS GENERALLY.

139. Pleadings defined. — Pleadings are the formal allegations of the parties of their respective claims and defences.¹

140. Object of Pleadings. — The object of the pleadings is (1) to make known to the court the real matter in controversy, to enable the court to see — (a) that the case is of such nature that the plaintiff on due proof may obtain the relief the law entitles him to have; (b) to confine the inquiry to the points in which the parties disagree. (2) To apprise each party of the grounds of claim or defence put forward by the other. (3) To make apparent by the record what controversy has been litigated and concluded by the judgment in the action.

141. Pleadings must be in Writing. — Anciently pleadings were conducted in court orally, and the whole pleadings were called the parol;² but for centuries

¹ Code Ref. 94-95; Gould's Pl. ch. 1, § 2.

² 3 Blackst. 292.

the pleadings in civil actions have been required to be in writing.¹ The codes either expressly or by implication require all pleadings to be in writing.² To this proposition there is the apparent exception that objections to the jurisdiction of the court, or to the sufficiency of a pleading, that it does not state a cause of action or defence, may be raised on the trial by what is sometimes called a demurrer *ore tenus* (that is, orally, — by word of mouth).

142. Pleadings must be subscribed by Party or Attorney. — All the codes require that the pleadings be subscribed by the parties making them or by attorneys for such parties. When an attorney appears in the action, the pleadings of his client should be subscribed by him.³ When the party conducts his own case, usually he signs the pleading himself, adding after his signature the word "plaintiff" or "defendant, *in propria persona*" (in proper person).

143. Pleadings must be filed. — As the pleadings constitute part of the record, it is indispensable that they be filed. In some of the codes they must be filed at the institution of the action; in others, by or before the first day of the term; in others, at or before the trial.⁴ They must be used in making the "judgment roll," and in the practice of each State (not here considered) procedure is provided to procure filing. Where original pleadings are lost, the court may direct copies to be filed in their stead, as is the practice at common law, and if this cannot be done, the court may order new pleadings to be filed.⁵

¹ Gould's Pl. ch. 1, § 2.

² Code Ref. 100; *Becket v. Cuenin*, 15 Col. 281.

³ Code Ref. 101.

⁴ Code Ref. 218-224.

⁵ *Davis v. Wilson*, 11 Kan. 74; *Renouill v. Harris*, 2 Sand. 642; Code Ref. 224 a.

144. Identity of Principles of Pleading.—While the codes expressly abrogate the formalities of the older systems of pleading and the rules by which their sufficiency is determined, the objects and essential principles are the same in all systems.¹

145. Fictions abolished.—The law permits some fictions, or legal assumptions that some things are true which are not true. The assumptions are of an innocent and beneficial character. The maxims obtain “that in a fiction of the law equity subsists;” “A legal fiction is consistent with justice.”² The former system of pleading permitted some fictitious allegations; such, for example, as the allegation of lease, entry, and ouster in ejectment, the allegation of a loss by the plaintiff and finding by the defendant in trover, the fiction of a promise in cases where the law implies one, etc. The code system of pleading abrogates all the fictions which had become so frequent and essential in the common-law system of pleading. The codes of several States expressly and superfluously abolish fictions in pleading;³ but under all the codes the requirement that the facts constituting the cause of action or new matter constituting defence be stated clearly excludes the resort to the allegation of fictions.⁴

146. Uniformity of System.—The codes provide a uniform system of pleading. Whether the action is one which would formerly be denominated legal or equitable, the form of the action is the same; and the rules governing the pleadings, their form, series, and sufficiency, are

¹ *Buddington v. Davis*, 6 How. Pr. 401.

² 3 Blackst. Com. 43, 283.

³ Code Ref. 96.

⁴ *Dunning v. Thomas*, 11 How. Pr. 281; *Bush v. Prosser*, 11 N. Y. 352; *Lackey v. Vanderbilt*, 10 How. Pr. 155.

the same. While the statement of the cause of action must vary to meet the infinite variety of facts, the rules of statement in actions *ex contractu* or *ex delicto*, or in actions legal or equitable in their nature, are alike. They will in their proper connection be considered.

147. Common-law Rules of Pleading abrogated.—The codes very generally declare that the rules by which the sufficiency of pleadings are determined are those prescribed in the codes themselves.¹ This provision has been generally interpreted by the courts to mean that the former rules of pleading at common law and in equity are abrogated. They are no longer of force or authority, where the codes are adopted, simply as the old rules. Where they are applied, it is because they are expressly enacted or necessarily implied from the language of the statute.² From many decisions, under the code, referring to and following the old rules of pleading, it might be inferred that they are still in force; but when followed, it is because they inhere in the new system, not that they are in force as the old rules.

148. The Pleadings under the Code are :—

1. “The *Complaint*,” as it is called in part of the States,³ in others “the petition,”⁴ in which the plaintiff sets forth his cause or causes of action.

2. The demurrer of the defendant to such complaint or petition.⁵

3. The answer of the defendant to the complaint or petition, in which he sets forth his defences or counter-claims.⁶

¹ Code Ref. 97; *Kolloch v. Scribner*, 98 Wis. 104.

² *Trustees v. Odlin*, 8 Ohio St. 293; *Jolly v. Terre Haute, &c. Co.* 9 Ind. 421; *White v. Joy*, 13 N. Y. 83, 90; *People v. Ryder*, 12 N. Y. 433, 438; *Ahern v. Collins*, 39 Mo. 145, 150.

³ Code Ref. 102.

⁴ Id.

⁵ Id. 128-136.

⁶ Id. 151.

4. The demurrer of the plaintiff to the answer.¹

5. The reply of the plaintiff to the defendant's counter-claims.² In some States a reply is permitted,³ or may be ordered by the court,⁴ to defensive matter pleaded by way of confession and avoidance.*

6. The demurrer of the defendant to the plaintiff's reply.⁵

SECTION II.

THE COMPLAINT OR PETITION.

149. The Complaint or Petition.—The first pleading on the part of the plaintiff is the complaint or petition. It corresponds to the declaration in common-law pleading, and to the bill in equity. All codes prescribe that it shall contain: (1) (a) The title of the cause, specifying the name of the court in which the action is brought; (b) the name of the county designated by the plaintiff as the place of trial; and (c) the names of the parties to the action, plaintiff and defendant. (2) A plain and concise statement of the facts constituting each cause of action, without unnecessary repetition. (3) A demand of the judgment to which the plaintiff supposes himself entitled; if a money judgment be demanded, the amount

¹ Code Ref. 189-197.

² Id. 203.

³ Id. 208.

⁴ Id. 209.

⁵ Id. 212.

* NOTE.—In California, Nevada, and Idaho no reply is allowed. In Connecticut, Indiana, Iowa, Minnesota, Nebraska, Ohio, Oklahoma, Utah, and Wyoming, it is allowed to defensive matter; and in New York, North Carolina, North Dakota, and South Dakota, the court may require a reply to be filed to defensive matter when deemed necessary. In all the States except the three first named, a reply is required to the counter-claim.

thereof should be stated.¹ In several of the States the amount with interest is to be demanded. This is the better usage in all the States. In the States of Ohio, Kentucky, Kansas, Nebraska, the names of the parties must be followed by the word "petition." The general frame of the complaint will better be understood by the accompanying —

FORM OF COMPLAINT.

State of —, }
County of —. } In Circuit Court.

JOHN DOE, *Plaintiff*,
 vs. }
RICHARD ROE, *Defendant*. } Complaint [*or* Petition].

The plaintiff above named, by —, his attorney, complains of the above-named defendant, and for (a first) cause of action alleges: —

That [*here state the facts constituting the cause of action*].

Wherefore the plaintiff demands judgment against the defendant [*here specify the relief which plaintiff demands*], and for the costs and disbursement of this action.

AMOS LAW,
Plaintiff's Attorney,
Milwaukee, Wis.

Verification, to be later explained.

150. The title, as has been said, must name the court in which the action is brought, which may be done as indicated in the above form. It has been held that the omission of the name of the court from the title of the complaint is a fatal objection;² but where the same is properly given in the summons served with the complaint, its omission in the complaint is an error which would be

¹ Code Ref. 102.

² Ward v. Stringham, 1 Code Rep. 118.

disregarded;¹ and in any event, the complaint could be amended to supply the defect, if objection were made.²

151. The Names of the Parties.—The following rules should be observed in giving the names of the parties in the title:—

1. The full, true Christian and surnames of all the parties plaintiff and defendant should be given.³

2. The initials of the Christian name ought not to be used. Such use, however, is an irregularity, and not a fatal defect;⁴ it is permissible by statute in Montana,⁵ and is generally disregarded.⁶ But the practice of using initials is loose and vicious.⁷ If used, they must be used in the order in which the Christian names are.⁸ The court will take judicial notice of the abbreviations in common and general use, as Wm. for William, Geo. for George, when used in pleadings.⁹

3. The middle name may be given by initial, or be omitted altogether, as the law takes no notice of it, but deems it unimportant;¹⁰ but—

4. If a person commonly uses his middle instead of his

¹ *Van Namee v. People*, 9 How. Pr. 198; *Van Benthuyssen v. Stevens*, 14 How. Pr. 70; *McLeran v. Morgan*, 27 Ark. 148.

² Code Ref. 315.

³ *Pollock v. Dunning*, 54 Ind. 115; *Hill v. Thatcher*, 2 Code Rep. 3; *Kellam v. Thoms*, 38 Wis. 601.

⁴ *Zwickey v. Haney*, 63 Wis. 464; *Ferguson v. Smith*, 10 Kan. 402.

⁵ Code Ref. 46.

⁶ *Zwickey v. Haney*, 63 Wis. 464; *Walwagood v. Randolph*, 22 Neb. 493.

⁷ *Kellam v. Thoms*, 38 Wis. 601.

⁸ *Zwickey v. Haney*, 63 Wis. 464; *Fanning v. Krapff*, 61 Ia. 417.

⁹ *Fenton v. Perkins*, 3 Mo. 144; *Jones Est.* 27 Pa. St. 338.

¹⁰ *Bratten v. Seymour*, 4 Watts (Pa.), 329; *Rooks v. State*, 83 Ala. 79; *People v. Lake*, 110 N. Y. 61; *Co. Litt.* 3 a.

first name, and is generally called by it, he may be so named in the complaint.¹

5. In actions against partnership firms, the names of the individual partners should be given,² as the firm name is not known to the law. But in some States the action may be brought against the firm in the firm name,³ and even associations, societies, etc., not constituting partnerships nor corporations, may be sued in the name used to designate the same.⁴ But where an action is begun in the firm name, the irregularity will be amended on motion,⁵ and disregarded on appeal;⁶ and judgment cannot for such error be impeached collaterally.⁷

6. Where persons sue or are sued in a representative capacity, the title should indicate it, thus:—

JOHN DOE, as administrator of the estate of	}
JAMES DOE, deceased, <i>Plaintiff</i> ,	
<i>against</i>	
RICHARD ROE, as executor of the last will	
and testament of SAMUEL ROE, deceased,	}
<i>Defendant.</i>	

The word “as” should not be omitted;⁸ but if the averments of the complaint show that the action is by or against parties in representative capacity, the defect of omitting the “as” or description of representative character in the title is cured.⁹

7. A corporation should sue and be sued in its cor-

¹ *State v. Martin*, 10 Mo. 391; *Diggs v. State*, 49 Ala. 311.

² *Weiss v. Davis*, 28 Neb. 566. ³ Code Ref. 48.

⁴ *Id.* 50.

⁵ *Bushnell v. Allen*, 48 Wis. 460.

⁶ *Frisk v. Reigelman*, 75 Wis. 499.

⁷ *Bennett v. Child*, 19 Wis. 362.

⁸ *Sheldon v. Hoy*, 11 How. Pr. 11; *Bennett v. Whitney*, 94 N. Y. 302; *Wheeler v. Smith*, 18 Wis. 651.

⁹ *Beers v. Shannon*, 73 N. Y. 292; *State v. Bartlett*, 68 Mo. 581.

porate name, as given in the charter or articles of association.¹ If the name be changed, actions by or against the corporation thereafter should be in the changed or new name.² A mistake in the corporate name is amendable, as in other cases.³ In some States the misnomer is waived unless attention is called to it, and then amendment is allowed to give the true name;⁴ in others, it is ground for plea in abatement.⁵ A slight variance in the name will be regarded as immaterial.⁶

8. One who does business under an assumed or business name may sue or be sued in that name.⁷

9. The names of parties should be correctly spelled, but misspelling which does not change the sound works no harm; it matters not how incorrectly names are spelled, if they are *idem sonans* (the same sound).^{8*}

10. A plaintiff who is ignorant of the defendant's true name is authorized by most of the codes to sue him by a fictitious name, and amend by order of the court, substituting the true name when discovered.⁹ The form in such case, and the allegation in the complaint, may in most code States be as follows:—

¹ *Bank v. Van Rensselaer*, 6 Hill, 240.

² *Donsman v. Pres't*, etc. 1 Pin. Wis. 81.

³ *Pope v. Capital Bank*, 20 Kan. 440.

⁴ Code Ref. 87, 309.

⁵ *Miller v. Stettiner*, 22 How. Pr. 518; *Peden v. King*, 30 Ind. 181.

⁶ *Thatcher v. Bank*, 19 Mich. 196.

⁷ *England v. N. Y. Pub. Co.* 8 Daly (N. Y.), 375; *City Council v. King*, 4 McCord L. (S. C.) 487; *In re Snook*, 2 Hilt. N. Y. 566; *Goodsell v. W. U. Tel. Co.* 130 N. Y. 430.

⁸ *Robson v. Thomas*, 55 Mo. 581.

⁹ Code Ref. 87.

* *NOTE*.—See extensive collation of decisions under "Name," in *Am. and Eng. Enc. of Law, and Cent. Law Jour.* vol. xxii. p. 487.

State of —, }
 County of —. } In Circuit Court.
 JOHN DOE, Plaintiff, }
 v. } Complaint.
 RICHARD ROE, Defendant. }

The above-named plaintiff, by —, his attorney, alleges :

That he is ignorant of the true name of the defendant, and unable to ascertain the same; and that he brings this action against him by the above name; that the defendant is described as follows : [*here add such description as will reasonably indicate the person intended*]. And the plaintiff for cause of action against said defendant alleges : [*here state cause of action, etc., and demand judgment*].

11. When the action is by or against the State or a subdivision thereof, or a municipality, the local law or charter should be consulted as to the name in which the action should be brought. It is usually brought by or against the State, county, town, city, village, or district; but some statutes provide that the party named as plaintiff or defendant shall be some officer or board. As to this matter local statutes must be consulted.

151 a. The Statement of the Facts.—The codes all prescribe that the complaint or petition shall contain “a plain and concise statement of the facts constituting each cause of action.”¹ Under this general requirement the following rules are among the most important:—

1. *State the facts in plain language*, that can easily be understood. The pleadings in all the code States are in the English language. The style which is plainest, most lucid and direct, should be cultivated. In pleading, no attempt to be facetious, humorous, or imaginative should ever be indulged. No indecent, vulgar, or obscene language should be used when it can be avoided.

¹ Code Ref. 105.

2. *Avoid all Superfluous or Redundant Allegations.* — Redundant matter in a pleading may be stricken out on motion.¹ Under the codes especially, “a terse style of allegation, involving a strict retrenchment of unnecessary words, is the aim of the best practitioners.”² The turgid, prolix style of the old system, overladen with adjectives and repetition, should be studiously shunned. This rule excludes all foreign matter, and all matter which, though not wholly foreign, does not require to be stated.³

3. *Material Facts only are to be stated.* — By material allegations are meant, and some of the codes define them to be, those essential to the claim or defence, which could not be stricken out of the pleading without leaving it insufficient.⁴ Under this rule, as to materiality of facts, observe the following directions: (a) *State the facts, not the evidence of the facts.* This is sometimes difficult; in the endeavor to avoid stating mere legal conclusions, many pleaders, seeking to state the facts as they occurred, fall into the error of stating the evidentiary details. (b) *State facts, not mere conclusions of law.*⁵ The codes permit conclusions of law to be alleged in a few instances; viz.: (1) In pleading the performance of conditions

¹ Code Ref. 293. *Post*, p. 294.

² *Steph. on Pl. s. v. Rule iii.*

³ *Id.*

⁴ Code Ref. 254.

⁵ For instances of allegations of mere legal conclusions, see *Sheridan v. Jackson*, 72 N. Y. 170; *Fagan v. Strong*, 7 N. Y. Supp. 919; *City of Buffalo v. Holloway*, 7 N. Y. 493; *Adams v. Holley*, 12 How. Pr. 326; *Elmore v. Hill*, 46 Wis. 618; *Sherwood v. Sherwood*, 45 Wis. 357; *Conrad v. Schwamb*, 53 Wis. 372; *Pelton v. Bemis*, 44 Ohio St. 51. To allege that a thing was “duly” done or “lawfully” done, without stating the special facts which show it to have been duly or lawfully done, is generally only to allege mere matter of law. *Braun v. Sauerwein*, 10 Wall. 218, 223; *Myers v. Machado*, 6 Duer, 514; *Cruger v. Halliday*, 11 Paige, 314. But see *People v. Ryder*, 12 N. Y. 433; *Fowler v. Ins. Co.* 23 Barb. 143; *French v. Willet*, 4 Bosw. 649. See *Crowley v. Hicks*, 98 Wis. 566.

precedent, the pleader need allege only that "he duly performed all the conditions and covenants on his part to be performed."¹ (2) In pleading a judgment or other determination of a court of limited jurisdiction, it need only be alleged that the judgment, etc., was duly given or made.² (3) In many States, in declaring for violation of ordinances or statutes imposing a forfeiture, it need only be alleged that defendant is liable or indebted under the provisions of the ordinance or particular statute.³ (4) In most of the codes, a short form of complaint is permitted, by which the pleader may set forth a copy of the instrument for the payment of money, and to state that there is due thereon the sum which he claims.⁴ (c) *Do not state facts which are necessarily implied.*⁵ (d) *Do not state facts of which the court takes judicial notice.*⁶ Some of the codes expressly forbid such allegations.⁷ This is an universal rule in English and American pleading. The record should not be cumbered with the averment of matters which the court judicially knows. As to the matters of which the court takes judicial notice, consult works of evidence.⁸ (e) *State facts as they occurred, rather than according to their legal effect.* While many authorities under the code hold that it is sufficient to allege facts according to their legal effect,⁹ the better rule, as insisted

¹ Code Ref. 277.

² Id. 275.

³ Dillon on Mun. Corp. 2d ed. § 414.

⁴ Code Ref. 271.

⁵ Bliss's Ann. Co. p. 382 b.

⁶ Bank v. Edwards, 11 How. Pr. 216; Miles v. Jones, 28 Mo. 87; Bank v. Wadsworth, 24 N. Y. 547; Keteltas v. Myers, 19 N. Y. 231.

⁷ Code Ref. 257-258.

⁸ 1 Greenl. on Ev. ch. ii. §§ iv.-vi.; Wharton on Ev. 3d ed. ch. v. §§ 276-340; Rice on Ev. ch. ii.; Stephen's Dig. of Ev. ch. vii. arts. 58-59; Bliss's N. Y. Ann. Code, 3d ed. vol. i. p. 382.

⁹ Bryce v. Brown, 7 Barb. 801; Bennett v. Judson, 21 N. Y. 238; Brown v. Champlin, 66 N. Y. 214; Rochester R. R. v. Robinson, 139 N. Y. 242.

by able authorities and text-writers, is to state them as they occurred.¹ For example, it may be alleged that A promised to B, when in fact the promise was made by C as agent of A; which is in legal effect A's promise. The code pleader, while he might allege that A promised, would aver that A, by C, his agent, made the promise. Again, by the common-law pleading, where a promise is implied, the declaration in assumpsit would allege a promise. The strict code pleader will allege the facts from which the promise is implied. But "it is not necessary nor proper for the pleading to set out all the minute facts; the ultimate facts, not the evidence, should be pleaded."² In some cases it will be impossible to state the facts otherwise than according to their legal effect; and generally, where no fictions are involved, a pleading will be sufficient in which the facts are stated accurately according to their legal effect. (*f*) *Pleadings should not be double*. The common-law rule, as we have seen, forbids duplicity, or the alleging of several distinct matters in support of the same demand.³ In equity the bill is multifarious which improperly joins two causes of action in one statement. Duplicity under the code is the jumbling of two or more causes of action or defences into one count or statement. It is bad pleading, and by statute in Missouri is declared a substantial objection.⁴ It is generally treated of under the codes as the improper uniting of causes of action⁵ or the indefinite and uncertain statement of causes or defences.⁶ The code rule against duplicity may be stated thus: Do not confound into one

¹ *Ives v. Humphrey*, 1 E. D. Smith, 196; *Farrin v. Sherwood*, 17 N. Y. 227; *Cady v. Allen*, 22 Barb. 388; Pom. Rem. §§ 529, 537; Bliss's Code Pl. 2d ed. § 158.

² *Cowie v. Toole*, 31 Ia. 513, 516.

³ *Ante*, p. 23.

⁴ R. S. 1889, § 2058.

⁵ *Post*, p. 293.

⁶ *Pierce v. Cary*, 37 Wis. 232

count or statement two or more distinct causes of action, nor combine in one statement in an answer two or more defences.¹ The manner of taking objection to this fault in pleading will be spoken of later on. The pleader is not allowed to plead and demur to the same matter at the same time under the codes, any more than at common law,² except in the States of California (§ 431; *People v. McClellan*, 31 Cal. 103), Nevada (§ 8064), and in Utah (§ 3222), whose codes expressly permit it. (g) *Do not anticipate defences.* The plaintiff in equity, as has been noticed,³ could in the charging part of his bill anticipate and rebut the defences of the defendant. At common law this was not allowed. It was, as Hale, C. J., remarked, "like leaping before one comes to the stile."⁴ Only the facts constituting the cause of action — namely, those which make out a *prima facie* case — need be alleged.⁵ Some exceptions to this rule have been permitted.⁶ It is ground of special but not general demurrer in California that a pleading anticipates a defence.⁷ If one should in pleading anticipate a defence, he must state facts by his complaint to show that the defence is insufficient, or his complaint will be bad.⁸

¹ *Brown v. Nichols*, 123 Ind. 492.

² *Spellman v. Weider*, 5 How. Pr. 5; *Davis v. Hines*, 6 Ohio St. 473.

³ *Ante*, p. 67.

⁴ Steph. on Pl. s. iv. Rule vii.

⁵ *Van De Mark v. Van De Mark*, 13 How. Pr. 372; *Giles v. Betz*, 15 Abb. Pr. 285; *Canfield v. Tobias*, 21 Cal. 349; *Thompson v. Ry. Co.* 51 Mo. 190; *Lee v. Troy*, 98 N. Y. 115; *Cahen v. Ins. Co.* 69 N. Y. 300; *Potter v. Ry. Co.* 20 Wis. 533; *Cunningham v. Lyness*, 22 Wis. 251; *Ruggles v. Fond du Lac*, 53 Wis. 436.

⁶ *Brackett v. Wilkinson*, 13 How. Pr. 102; *Wade v. Rusher*, 4 Bosw. 537.

⁷ *Munson v. Bowen*, 80 Cal. 572.

⁸ *Morgan v. R. R. Co.* 28 N. E. 543.

Exceptions and Provisos in Contracts and Statutes, how pleaded.—In works on statutory construction we note the difference between a *proviso* and an *exception*. This difference must be carefully observed in drawing pleadings. The general rule is that in pleading upon a statute or a contract which has a proviso or qualifying phrase, the plaintiff need only state so much of it as makes a *prima facie* case or right of action; and if any other part of the statute or contract give matter of defence, that the opposite party avail himself of it by way of avoidance in his pleading. But if the proviso be in the nature of an exception, and be contained in the body of the act or contract, it must be noted by the plaintiff, and the liability shown to exist consistently with it. The rule as stated by Lord Raymond is: "The difference is when the exception is embodied in the body of the clause, he who pleads the clause ought to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause and leave it to his adversary to show the proviso."¹

The Statute of Frauds.—Under this rule against anticipating defences should be noted that, except where the statute otherwise provides,² it is unnecessary to allege that a contract is in writing or without the Statute of Frauds.³

¹ Heard's *Steph. on Pl.* 443. For cases illustrating the rule and the distinction above noted, see *Harris v. White*, 81 N. Y. 532. As to its application in criminal pleading, see *Bishop, Cr. Pro.* vol. i. 3d ed. §§ 632-639. See also *Gould's Pl.* Heard's ed. ch. iv. §§ 19-22; *Winney v. Sandwich Mfg. Co. (Iowa)* 50 N. W. 565.

² In Iowa it is ground for demurrer that a contract required to be in writing is not alleged to be in writing. *McClain's An. Stats.* 1888, § 3854. So held in Kentucky. *Smith v. Fale*, 13 B. Mon. 443.

³ *Gardiner v. Armstrong*, 31 Mo. 335; *Sherwood v. Saxton*, 63 Mo. 78; *Lewin v. Stewart*, 10 How. Pr. 513; *Hilliard v. Austin*, 17 Barb. 141; *Robbins v. Deverill*, 20 Wis. 142.

But if it appear on the face of the pleading that the contract is void under the statute, then it would be demurrable.¹

The Statute of Limitations.—The former system of pleading required that the party who desired to interpose the bar of the Statute of Limitations must plead the statute. It was not ground for demurrer that it appeared on the face of the pleading that the statute had run upon the cause of action set forth. Under the codes it has been held otherwise.² And by many of the codes it is made ground of demurrer that it appears on the face of the pleading that it is not commenced within the period of the Statute of Limitations.³ As to pleading the statute, more is said further on.⁴

152. 4. Rules tending to Certainty of Issue.—In stating the facts constituting the cause of action, it is essential that they be stated with *certainty*. The codes all provide a remedy for uncertainty and indefiniteness of allegation,—some, by making the pleading demurrable for that fault;⁵ others, and most of them, by allowing the opposite party to move for an order requiring the pleading to be made more definite and certain.⁶ This motion is usually granted with costs, and compels the pleader to amend, more definitely and certainly stating his matter.

Under this head, following in part the arrangement of Stephen on Pleading, may be collated some of the more important rules.

(a) *Pleadings must have Certainty of Place.*—This rule does not now stand on the old common-law reason.

¹ Howard v. Brower, 37 Ohio St. 402; Wentworth v. Wentworth, 2 Minn. 277.

² Smith v. Richmond, 19 Cal. 476; Howell v. Howell, 15 Wis. 55; Bank v. Loweny, 93 U. S. 72.

³ Code Ref. 135.

⁴ Post, p. 247.

⁵ Code Ref. 197; p. 293.

⁶ Code Ref. 299.

It means merely that the venue should be laid; that is, the action be brought in the proper county. The several codes provide that certain actions shall be local. Actions relating to real estate are of this class. The actions, which the codes require to be brought in the county where the property is situated or the cause of action arose, are usually these: (a') Actions to recover real property, or for injuries thereto; (b') Actions for the partition of real property; (c') Actions for the foreclosure of mortgages on real property; (d') Actions against local officers for some official malfeasance or non-feasance; (e') Actions to recover fines or penalties.

In cases where performance is to be alleged at a given place, or non-performance charged, etc., the allegations should be certain and precise, and alleged as they can be proved,¹ otherwise an amendment on terms may be necessary to escape the effect of a variance. Again, pleadings must have certainty of place when contracts are pleaded which were made in other countries, and depend for their validity on the laws of those countries. In other words, when the contract must stand for its validity on the law of some place other than the place of the forum, the place must be alleged, and the law of the place² must also be stated.

(b) *When Time is material, Pleadings must allege it truly.* — Time is often material, especially when acts must be done within a certain time to be valid; and when material, must be truly alleged and proved as alleged. But where not essential to the cause of action, the time may be generally alleged under a *videlicet*, and any time be proved.³ The form of allegation is usually: "That here-

¹ *Clark v. Dales*, 20 Barb. 42. ² *Thatcher v. Morris*, 11 N. Y. 437.

³ *Backus v. Clark*, 1 Kan. 303; *Lyon v. Clark*, 8 N. Y. 148; *Lester v. Jewett*, 11 N. Y. 453; *Paine v. Trumbull*, 33 Wis. 164; *Leihy v. Lumber Co.* 49 Wis. 165.

tofore, to wit, on the — day of —, A. D. 18—;” or, “That on or about the — day of —, A. D. 18—.” It is usual to allege a time when a contract was made, act done, etc. If there should be no such allegation it would be ground for a motion to make more definite and certain.¹ In cases where performance must be alleged at a particular time, or non-performance charged by a particular time, the allegations should be certain and precise.

(c) *Pleadings must specify Quality, Quantity, and Value.*—Such was a rule of the common law, always rather loosely applied; and under the codes extreme exactness is not required; and quantity and value, unless they are material to the issue, need not be proved as alleged.² In complaints for work, labor, and services, and for goods sold, allegations of value are held to be material,³ so far that a verified answer denying the value as alleged cannot be stricken out as sham.

(d) *Descriptions of land should be given with certainty,* so that the premises can be identified, and the sheriff or other officer can sell the same, or put a party in or out of possession, from the description.⁴

(e) *Pleadings must specify Names of Persons.*—This rule of the common law⁵ applied both to names of parties and others who might be mentioned in the pleadings. So far as it relates to parties, it has already been considered.⁶ When the names of others than parties are given in pleadings, they should be given with accuracy. The variance which may result, if they are not, may be material, and

¹ *People v. Ryder*, 12 N. Y. 433.

² *Chamblee v. McKenzie*, 31 Ark. 155; 1 Greenl. Ev. § 61; *Reilly v. Ringland*, 39 Ia. 106; *Woodruff v. Cook*, 25 Barb. 505.

³ *Gregory v. Wright*, 11 Abb. Pr. 417.

⁴ Code Ref. 287; *Livingston v. Morris*, 71 Mo. 603.

⁵ *Ante*, p. 27.

⁶ *Ante*, p. 184.

amendment necessary, even if no worse consequences follow.¹

(f) *The Complaint or Petition must show Title.*—This rule of the common law has been given in its proper place.² Under the codes it is necessary to allege title. The averment that one is the owner,³ or entitled to possession, is strictly an averment of a conclusion of law.⁴ But the codes quite generally declare that the complaint shall be sufficient which alleges that the plaintiff is the owner, or owner in fee, or that he has an estate in fee, etc.⁵ So, ownership or possession of chattels may be alleged.⁶

The following forms of allegation are believed under most of the codes to be sufficient: ⁷—

“That the plaintiff was, on the — day of —, in the year 18—, since has been and still is the owner in fee, and actually seised of the following described premises.”

Or—

“That the plaintiff has and owns an estate in fee on the following described premises, and by virtue thereof is actually seised and in possession.”

Or—

“That the plaintiff is the owner, for and during his natural life, and entitled to the immediate possession of,” etc.*

¹ *Post*, p. 276.

² *Ante*, p. 28.

³ *Adams v. Holley*, 12 How. Pr. 326; *Thomas v. Desmond*, 12 How. Pr. 321. *Contra*, *Davis v. Haploch*, 6 Duer, 254; *Walter v. Lockwood*, 23 Barb. 228.

⁴ *Garner v. McCullough*, 48 Mo. 318.

⁵ Code Ref. 285.

⁶ Code Ref. 284.

⁷ See *Pinney v. Fridley*, 9 Minn. 34; *Palmer v. Smedley*, 6 Abb. Pr. 205; *Stall v. Wilbur*, 77 N. Y. 162.

* NORM.—The statutes of the various code States must be consulted as to alleging title. In Arkansas one must set forth his title

The allegation that the plaintiff is the owner of certain goods is a statement of fact, and it is unnecessary to allege the source or derivation of title, or to set forth facts from which the inference of ownership arises.¹ The allegation of ownership raises the presumption of possession.²

As to title to *choses in action*, when the assignee of a non-negotiable *chose in action* sues upon it, he should allege that the original assignor assigned it to him for value, or that for value it had, through several mesne assignments, been transferred to him, and that he owns the same. When it is negotiable paper sued upon by the indorsee, he should allege that it was indorsed by the payee and delivered to him, the plaintiff, for value, and that he is the owner and holder of the same. A statement that for value received the note "lawfully came to the possession of the plaintiff" is good on demurrer;³ so is the allegation that he is the lawful owner and holder of it.⁴

(g) *In actions on contract, not under seal, the consideration must be stated*, otherwise the contract will appear from the pleading to be mere *nudum pactum*.⁵ But in

¹ *Heine v. Anderson*, 2 Duer, 318; *Malcom v. O'Reilly*, 89 N. Y. 156; *Dambmann v. White*, 48 Cal. 439; *Thurber v. Jones*, 14 Wis. 16.

² *Leihy v. Ashland Lumber Co.* 49 Wis. 165.

³ *Lee v. Ainslie*, 4 Abb. Pr. 463.

⁴ *Reeve v. Fraker*, 32 Wis. 243.

⁵ *Spear v. Downing*, 34 Barb. 522; *Winne v. Colorado Springs*, 3 Col. 155; *Burnet v. Bisco*, 4 Johns. 235.

deeds (§ 2632). In Iowa the pleader may allege title generally, and append an abstract of title to his pleading. In Missouri it is enough to allege right to possession (R. S. § 4631). In Ohio and Nebraska, that the plaintiff "has a legal estate." In Kansas that he "has a legal or equitable estate." In Indiana he must allege that he is entitled to the possession, and set forth his interest. In Wisconsin the statute requires the plaintiff to state what his title or interest is (R. S. 1878, § 3077; Code Ref. 285).

case of bills of exchange and promissory notes, in which the law implies a consideration, none need be averred.¹ Where necessary, a very general statement is sufficient, as, for example, "for a valuable consideration,"² for "value received,"³ etc.

(*h*) *In Actions ex contractu the Complaint or Petition must show Privity.*—In declaring on a contract, of course, the plaintiff must allege a right in himself and a liability in the other party. There must be such privity, such relation between them, as to create the right in the plaintiff and the liability against the defendant; and the facts must be alleged which show it, as they are the essential facts constituting the cause of action. This privity may exist—(*a'*) where the parties are the immediate contracting parties; (*b'*) where, by blood, they succeed to the rights of the original parties, as where the heir may sue or be sued on the obligation due to or by his ancestor; (*c'*) where there is privity in representation, as in the case of executor or administrator; (*d'*) privies in estate, as between donor and donee, lessor and lessee, etc.; (*e'*) privity that arises from the assignment of the contract, as where an assignee succeeds to rights or liabilities, and under the code may sue or be sued thereon; (*f'*) such privity as the law merchant creates in case of acceptors for honor, or accommodation acceptors, etc.; (*g'*) where a promise is made by A to B, upon consideration moving to A from B, but the promise is made for the benefit of C. Although there is no direct contract relation between A and C, yet it is generally held in American law that C

¹ Underhill v. Phillips, 10 Hun, 591; Durland v. Pitcairn, 51 Ind. 426. As to sufficient allegation of consideration, see Dolcher v. Fry, 37 Barb. 152; Seminary v. Browning, 37 Barb. 535.

² Bank v. Ins. Co. 72 Wis. 535.

³ Prindle v. Caruthers, 15 N. Y. 425; Meyer v. Hibsher, 47 N. Y. 265; Leonard v. Sweetzer, 16 Ohio, 1.

can maintain an action upon the promise,¹ whether it be simple or under seal.² (h') In the cases where a promise is implied from conduct, the facts must be alleged which raise the implied promise. (i') Where the devisee accepts a devise, charged with the payment of testator's debts.³ In all these cases the privity—the facts which bring the parties into contractual relation, or show in plaintiff the right and in the defendant the liability—must be alleged. (j') So there may be privity or liability growing out of domestic relations, as where the husband or parent is liable for necessities furnished the wife or child. In such cases the law implies a promise on the husband or parent's part to pay, and the old action was *assumpsit*. In code pleading the facts out of which the liability arises should be alleged, and the allegation be that the goods were delivered to the husband, the defendant.⁴

The case where the goods of an owner have been wrongfully converted, and the owner has his election to sue in tort or contract, is an instance of privity growing out of implied contract. That subject has already been considered.⁵

(i) *Pleadings must show Authority.*—In general, says Stephen, “where a party has occasion to justify under a writ, warrant, or precept, or any other authority whatever, he must set it forth particularly in his pleading, and show that he has substantially pursued it.”⁶ The pleader who

¹ *Delaware Co. v. Bank*, 4 Denio, 97; *Lawrence v. Fox*, 20 N. Y. 268; *Putney v. Farnham*, 27 Wis. 187; *Hendrick v. Lindsay*, 93 U. S. 143; *Davis v. Calloway*, 30 Ind. 112; *Meyer v. Lowell*, 44 Mo. 328; *Wiggins v. McDonald*, 18 Cal. 126; *Cubberly v. Cubberly*, 33 N. J. Eq. 82. So, both in actions at law and suits in equity.

² *McDowell v. Laev*, 35 Wis. 171.

³ *Gridley v. Gridley*, 24 N. Y. 130.

⁴ *Jacobs v. Scott*, 53 Cal. 74.

⁵ *Ante*, paragraphs 83–87.

⁶ *Steph.* on Pl. s. iv. Rule vi.; *ante*, par. 20.

does or justifies an act under such authority must set it forth: (a') If an officer acting under a writ, warrant, or other judicial mandate, he must show its due issuance out of a competent tribunal, its mandate or command, and that the thing done was done in compliance with it, and its due return. (b') If a party not an officer, he must set forth not only the writ, but the judgment also.¹ (c') Persons suing in representative capacity, such as executors, administrators, trustees of express trusts, assignees in bankruptcy, insolvency, receivers, surviving partners, surviving joint obligors or obligees, guardians, etc., or any others suing in representative capacity or by special authority, should allege the facts as to their appointment, qualification, and official character.² As to public officers, it need only be alleged that they are such, without alleging the fact of election and qualification.³ The form of allegation where one sues as administrator may be as follows; and it will suggest the form in case of others suing in representative capacity:—

State of —, }	In Circuit Court.
County of —. }	
A B, as Administrator of the Estate of C D,	} Complaint.
deceased, <i>Plaintiff</i> ,	
<i>against</i>	
E F, as Executor of the last will and testament	
of G H, deceased, <i>Defendant</i> .	

The above-named plaintiff, by —, his attorney, complains of the above-named defendant, and alleges:—

First. [*Here state the cause of action which accrued to the decedent.*]

¹ Steph. on Pl. iv. Rule vi.

² Judah v. Fredericks, 57 Cal. 389; White v. Joy, 13 N. Y. 83; Halleck v. Mixier, 16 Cal. 574. Not necessary in Iowa. An. Sta. 1888, § 3923.

³ Kelly v. Breusing, 32 Barb. 601; 33 Id. 123.

Second. That on the — day of —, A. D. 18—, the said C D died intestate, at —, in said county.

Third. That on the — day of —, A. D. 18—, letters of administration of the estate of the said C D were duly issued and granted to the plaintiff by the [county] court of said county, whereupon the plaintiff duly qualified on that day, and entered upon the duties of, and now is, such administrator.

Fourth. That the said G H, after the making of the agreement above set forth, and on the — day of —, A. D. 18—, died at —, leaving a last will and testament, which was afterwards, to wit, on the — day of —, A. D. 18—, duly admitted to probate, and allowed in the [county] court of said county; and the letters testamentary were thereupon, on that day, duly issued and granted by said court to the said E F, as executor of said will, who thereupon, on the same day, duly qualified, and entered upon the duties of such executor, and now is such.

(d') *Where consent of court is necessary to the bringing of the suit*, which sometimes is required in actions upon judgments,¹ actions by or against receivers,² etc., the complaint or petition should allege such consent.³

(j) *In Actions by or against Corporations, Corporate Existence must in general be alleged.*—(1) In case of public corporations created by public act of which the courts take judicial notice, and in the absence of statutory provisions, corporate existence need not be alleged.⁴ (2) In case of public corporations created by private acts, of which the courts do not take judicial notice, corporate existence should be alleged. This will seldom occur. (3) In actions by or against private corporations, organ-

¹ *Graham v. Scripture*, 26 How. Pr. 501.

² *Bank v. Risley*, 19 N. Y. 369, 376.

³ *Scofield v. Doscher*, 72 N. Y. 491; *Graham v. Scripture*, 26 How. Pr. 501.

⁴ *Selma v. Perkins*, 68 Ala. 145; *City Council v. Wright*, 72 Ala. 411; *Lebanon v. Griffin*, 45 N. H. 563; *Dillon on Mun. Corp.* 4th ed. § 83; *Smith v. Janesville*, 52 Wis. 680.

ized under private acts or under general laws, it is better to allege generally the corporate existence. In some States this is expressly required.¹ The allegation of corporate existence is not necessary in common-law pleading, nor in Indiana,² Kansas,³ Arkansas,⁴ Dakota,⁵ and Nebraska. Before the provisions of the statute cited below, it was held unnecessary in New York⁶ and Wisconsin.⁷ The objection, where it is an objection, that corporate existence is not averred, is waived if not made by answer or otherwise.⁸ (4) But where the adverse party makes a contract with a corporation by its corporate name, and is estopped from denying its existence, the corporation need not aver its existence.⁹

(*k*) *When Notice is necessary to create the Liability or complete the right of action, notice to the proper party must be alleged;*¹⁰ but notice is not necessary when the facts are peculiarly within the knowledge of the other party, or as much within his as that of the pleader, unless required as in many States now by statute.¹¹ Where facts exist which excuse notice, they should be

¹ N. Y. § 1775; Wis. § 3205; Iowa, § 3923; N. Dak. § 2908; S. Dak. § 2908.

² O'Donald v. R. R. Co. 14 Ind. 259; Cicero, &c. Co. v. Craighead, 28 Ind. 274.

³ Ryan v. Bank, 5 Kan. 658.

⁴ Building Assoc. v. Hogan, 28 Ark. 261.

⁵ Am. Mchi. Co. v. Moore, 2 Dak. 280; Exc. Bank v. Copps, 49 N. W. 223.

⁶ Bank v. Donnell, 41 Barb. 571; 40 N. Y. 410.

⁷ Strunk v. Smith, 36 Wis. 631; Bank v. Knowlton, 12 Wis. 624; Chickering Lodge v. McDonald, 16 Wis. 112.

⁸ Spense v. Ins. Co. 40 Ohio St. 517; State v. Torinus, 22 Minn. 272.

⁹ Ins. Co. v. Bowman, 60 Mo. 252; Palmer v. Lawrence, 3 Sandf. 161. See Bliss's Code Pleading, §§ 252-260.

¹⁰ Garvey v. Fowler, 4 Sandf. 665; Watson v. Walker, 23 N. H. 471; Wade on Notice, § 1387; Susenguth v. Rantoul, 48 Wis. 334.

¹¹ Wade on Notice, §§ 1390-1391.

alleged, and cannot be proved under an averment of due notice.¹

(l) *When a Demand is necessary to complete Plaintiff's Right of Action, the Demand should be alleged.*²

(m) *When a Scierenter must be alleged.*—In some actions the knowledge of the defendant is an essential, material fact, and must be alleged.³

The Degree of Certainty required in pleading, as to time, place and subject-matter, is general and difficult of application. It is the rule that there must be such certainty as the subject will conveniently admit of.⁴ Less particularity is required when the facts lie more in the knowledge of the opposite party,⁵ and less in statement of matter of inducement than in the main allegations.⁶

The Statement should be positive.—Facts should be alleged positively,⁷ not hypothetically, nor in the alterna-

¹ Garvey v. Fowler, 4 Sandf. 665; Pier v. Heinrichhoffen, 52 Mo. 333; Lumbert v. Palmer, 29 Ia. 104; Curtis v. State Bank, 6 Blackf. 312; Edw. on Bills, 636. But Daniel, in his work on Negotiable Instruments, 4th ed. §§ 1047-1049, insists that in commercial law, at least, facts excusing notice may be proved under general allegation of notice. The rule stated in the text is believed to be most in harmony with the principles of code pleading, and the safer rule to follow.

² Barrett v. Warren, 3 Hill, 348; Simmons v. Lyon, 55 N. Y. 671; N. Y. &c. Co. v. Richmond, 6 Bosw. 213; Powers v. Bassford, 19 How. Pr. 309. See Gay v. Paine, 5 How. Pr. 107; Bank of Geneva v. Gulick, 8 How. Pr. 51.

³ Vrooman v. Lawyer, 13 Johns. 339; Dearth v. Baker, 22 Wis. 73; Moore v. Noble, 53 Barb. 425; Lamb v. Kelsey, 54 N. Y. 645; Pierce v. Cary, 37 Wis. 232; and see Cooley on Torts, 498; Bliss's Ann. Co. 3d ed. v. i. 388.

⁴ Gould's Pl. 5th ed. 167; Steph. on Pl. *367.

⁵ Steph. on Pl. *370.

⁶ Steph. on Pl. *374.

⁷ Truscott v. Dole, 7 How. 221; Frary v. Daken, 7 Johns. 75; Blake v. Eldred, 18 How. Pr. 240; Lewis v. Kendall, 6 How. Pr. 59; Grant v. Bell, 87 N. C. 41.

tive.¹ If alleged positively, without qualification, they are assumed to be alleged upon the personal knowledge of the pleader.² They may be alleged upon his information, thus: "The plaintiff, upon information and belief, alleges;" or, "The plaintiff alleges that, as he is informed and believes," etc.³ The essential statement must be made. A mere statement that the facts are alleged to exist is not enough.⁴

The Statement should not be ambiguous; that is, capable of two meanings. Ambiguity is a fault at common law; and the pleading that is ambiguous is given that meaning which is most strongly against the pleader. The code rule of construction modifies this rule, requiring the pleading to be construed with a view to substantial justice.⁵ Ambiguity is ground for demurrer in California, Colorado, Idaho, Iowa, Montana, and Nevada.⁶ In the other code States it is ground for a motion to make more definite and certain.⁷

153. 5. Rules tending to prevent Obscurity and Confusion. — (a) *The statement should not be insensible nor repugnant.* A pleading is insensible when it is unintelligible. The remedy, under the codes, is by demurrer when the insensibility is such that no cause of action is stated.⁸ When the cause is stated but too vaguely or indefinitely to be clearly understood, the remedy is by motion to make more definite and certain.⁹

¹ *Wies v. Fanning*, 9 How. Pr. 543; *Hamilton v. Hough*, 13 How. Pr. 14; *Jameson v. King*, 50 Cal. 132.

² This is rule of present New York code (§ 524), but is not general. *Truscott v. Dole*, 7 How. Pr. 221.

³ *St. John v. Beers*, 24 How. 377; *Radway v. Mather*, 5 Sand. 654.

⁴ *Byington v. Saline Co.* 37 Kan. 654.

⁵ Code Ref. 259.

⁶ Id. 136.

⁷ Id. 299.

⁸ Id. 134.

⁹ Id. 299.

A pleading is repugnant when it is inconsistent with itself, some of its allegations disagreeing with others, as at common law.¹ Part of the inconsistent allegations are rejected as surplusage when it can be done and leave a sufficient cause stated; but if the repugnant allegations are mutually destructive of each other, and the repugnancy cannot be eliminated by rejecting part as surplusage, the remedy is by demurrer that there is an improper joinder,² or, in some cases, by motion to make more definite and certain.³

Where statements are inconsistent, general averments yield to specific statements of fact.⁴

(b) Care should be taken to avoid the *negative pregnant*, which is defined to be such a form of negative expression as may imply or carry with it an affirmative, thus rendering the statement ambiguous. Under the codes, in many instances, pleadings have been condemned for this fault.⁵ This most frequently occurs in answers.

(c) The statement must not be *argumentative*; that is, left to inference or argument.⁶ This fault rarely occurs in a complaint, more frequently in an answer. It is most likely to occur in a complaint when the pleader sets out matter by copying an instrument without directly alleging the matters contained in the instrument. This has been held bad on demurrer.⁷ And where the allegations

¹ Steph. on Pl. s. v. Rule i.; *Bynum v. Ewart*, 90 Tenn. 655.

² *Maxwell v. Farnham*, 7 How. Pr. 236; *Hazard v. Bannon*, 38 Fed. Rep. 220; *R. R. Co. v. Dusenberry* (Ala.) 10 Southern R. 274.

³ *Hewitt v. Brown*, 21 Minn. 163; *Bliss's Co. Pl.* § 315.

⁴ *Funk v. Beverly*, 112 Ind. 190; *State v. Casteel*, 110 Ind. 187.

⁵ *Dall v. Burceigh*, 1 Dakota, 218; *Lynd v. Dern*, 7 Minn. 184; *Dean v. Leonard*, 9 Minn. 190; *McMurphy v. Walker*, 20 Minn. 382; *Lorney v. Mooney*, 50 Cal. 610; *Prier v. Madigan*, 51 Cal. 178; *Leroux v. Murdock*, 51 Cal. 541; *Robbins v. Lincoln*, 12 Wis. 1; *Schaetzel v. Ins. Co.* 22 Wis. 412; *Crane, &c. Co. v. Morse*, 49 Wis. 368.

⁶ Steph. on Pl. s. v. Rule iii.; *Hamilton v. Hough*, 13 How. Pr. 14.

⁷ *Los Angeles v. Signoret*, 50 Cal. 298.

were not direct and positive, but made rather by argument or inference, the complaint was held demurrable.¹

(d) *The statement should not be hypothetical or in the alternative.*² By this is meant that an averment should not be that the fact is so or so; nor should it be that, if a fact is so, then another fact is so. This faultiness is oftenest found in answers, but is equally a vice in any pleading. Instances of its condemnation are numerous in the books.³ It is bad pleading by the rules of common law.⁴

(e) *The statement should not be by way of recital.*⁵ To say, "Whereas A struck B" is not to allege that A struck B. Nothing is asserted, hence there is nothing to deny. The averment must be positive.⁶

154. 6. Rules to prevent Prolixity.—The codes all require a "plain, concise" statement of the facts constituting the cause of action or defence, without unnecessary repetition.⁷ It is the perfection of pleading to state all the facts essential and material with brevity, omitting nothing material and cumbering the record with nothing else. With a view to avoid tediousness in pleading several statutory provisions are common to the codes; viz.:—

¹ *Buzzard v. Knapp*, 12 How. Pr. 504. See *Thompson v. Munger*, 15 Tex. 523; *Ditch Co. v. Elliott*, 10 Col. 327; *McDonald v. Flour Mills Co.* 31 Fed. Rep. 577. But see *Gilchrist v. Helena, &c. R. R. Co.* 47 Fed. Rep. 593; *Hart v. Meeker*, 1 Sandf. 623.

² Steph. on Pl. s. v. Rule iv.; *ante*, par. 25.

³ *McMurray v. Gifford*, 5 How. Pr. 14; *Sayles v. Wooden*, 6 How. Pr. 84; *Wies v. Fanning*, 9 How. Pr. 543; *Hamilton v. Hough*, 13 How. Pr. 14; *Jamison v. King*, 50 Cal. 132; *Wheeler v. Thayer*, 121 Ind. 64, 67.

⁴ *Ante*, p. 35; Steph. on Pl. s. v. Rule iv.

⁵ Steph. on Pl. s. v. Rule v.; *ante*, par. 26.

⁶ *R. R. Co. v. Adamson*, 114 Ind. 282, 284.

⁷ Code Ref. 105.

1. Facts are to be alleged in concise language, without unnecessary repetition.¹

2. *Items of an account* need not be stated in pleading, but copies of the account itemized must be afterward furnished if demanded.² So of a *bill of particulars*.

3. *In pleading judgments, etc.*, the facts conferring jurisdiction need not be alleged, but only that the judgment or other determination was "duly given or made,"³ the facts, if controverted, to be fully proved.

4. *Conditions precedent, etc.*—The performance of conditions precedent need not be alleged in detail; it is sufficient to allege generally due performance of them,⁴ and prove the details if denied.

5. *Private statutes* or rights derived therefrom may be pleaded, not by setting out the full statute, as at common law,⁵ but by referring to the title and date of passage.⁶ The court then virtually takes judicial notice of the statute, and of the whole of it.⁷

6. *Pleading by Copy: Short Form.*—Most of the codes contain the provision that "in an action or defence or counter-claim founded on an instrument for the payment of money only, it shall be sufficient for the party to give a copy of the instrument and to state that there is due to him from the adverse party a specified sum which he claims."⁸ This form is much used in complaints and counter-claims founded on such instruments as promissory notes,⁹ bills of exchange,¹⁰ due bills, chattel due bills.¹¹ It

¹ Code Ref. 105, 151, 203.

² Id. 264.

³ Code Ref. 275; 40 N. Y. S. 954.

⁴ Id. 277; *Baumbach v. Laube*, 99 Wis. 171.

⁵ Gould's Pl. 46.

⁶ Code Ref. 280.

⁷ *Hewitt v. Grand Chute*, 7 Wis. 282.

⁸ Code Ref. 279.

⁹ *Strunk v. Smith*, 36 Wis. 631; *Prindle v. Caruthers*, 15 N. Y. 425.

¹⁰ *Andrews v. Bank*, 2 Duer, 629.

¹¹ *Noonan v. Haley*, 21 Wis. 138.

does not apply in cases of bonds of guardians¹ and the like, nor to mortgages.² When the original payee sues the original maker or obligor, the form is adequate; but when indorsers, guarantors, etc., are to be charged, some facts not apparent on the face of the instrument should be averred, to make the form sufficient.³ In a few States the statute prescribes that the additional facts to show liability shall be stated.⁴ Copies of indorsements, acceptances, guaranties,⁵ etc., must be given so that the copies show a complete instrument and liability.⁶

FORM OF COMPLAINT UNDER THIS STATUTE.

Title of Cause. } *Complaint.*

The above-named plaintiff by —, his attorney, complains of the above-named defendant, and for cause of action alleges:

That on the — day of — A. D. 18—, at [*state place*] the said defendant made and delivered to the plaintiff a certain promissory note of which the following is a copy: [*here set out fully a copy of the note*].

That there is now due to the plaintiff on the said note the sum of — dollars, with interest thereon at the rate of — per cent per annum from the — day of — A. D. 18—, which he claims; and for which with the costs of this action he demands judgment.

*Attorney for Plaintiff.**

Verification.

¹ Carrington v. Bayley, 43 Wis. 507.

² Peyser v. McCormack, 7 Hun, 300.

³ Broome v. Taylor, 76 N. Y. 564.

⁴ Code Ref. 279.

⁵ Woodruff v. Leonard, 1 Hun, 632.

⁶ Broome v. Taylor, 76 N. Y. 564.

* NOTE. — It is not well to use this form when there are other facts than those apparent on the face of the instrument, necessary to show the liability of the defendant to the plaintiff. See Bliss's Ann. Code, § 534.

7. *Striking out Irrelevant or Redundant Matter.* — As a remedy for prolixity the codes provide for the striking out irrelevant and redundant matter in a pleading.¹ Of this more is said hereafter.²

155. *The Laying of Damages.* — At common law the declaration must “lay damages.” In code pleading the rules may be summarized as follows:

1. Where the facts stated show a legal injury, whether in contract or tort, a general averment of damages, as for example, “To the damages of the plaintiff the sum of — dollars,” is sufficient.³

2. Where the amount the plaintiff is entitled to recover appears from the statement of facts — as where the amount due the plaintiff is alleged on breach of a money demand, the demand of judgment may take the place of an *ad damnum* clause.⁴

3. When the damages are special and do not necessarily accrue from the wrong complained of, the facts showing such special damages must be specially alleged, and are provable only to the extent alleged.⁵ For example, where loss of custom is alleged, the customers induced to withdraw patronage must be named.⁶

155 a. *Interrogatories.* — In some States the codes permit the plaintiff to insert interrogatories in his pleading which the defendant is required categorically to answer.⁷ But this is unnecessary, as the opposite party can be examined on oath, either before or after the pleadings are in.⁸

¹ Code Ref. 299.

² *Post*, p. 292.

³ Chitty Pl. 396; Sutherland on Damages, 2d ed. § 418 and note.

⁴ *Riser v. Walton*, 78 Cal. 490; *Weaver v. Boom Co.* 28 Minn. 542; *Bartlett v. Bank*, 79 Cal. 218; Sutherland on Damages, § 414.

⁵ Am. & Eng. Enc. of Law, Damages, pp. 50, 51.

⁶ Odger's Libel and Slander, 3d ed. 342.

⁷ Code Ref. 216.

⁸ *Ante*, p. 59 n.

156. The Demand for Relief or Judgment. — The codes are substantially alike in requiring that the complaint must contain “a demand of the judgment (or relief) to which the plaintiff supposes himself entitled. If a recovery of money be demanded, the amount thereof shall be stated.”¹ Some of the codes, following Ohio, add the words, “if interest thereon be claimed, time from which interest is to be computed shall also be stated.”² It is not proper in code pleading to “pray for process” as in equity, nor to pray for provisional remedies, such as suit-money or alimony *pendente lite* in divorce, nor temporary injunctions. All such, not being part of the judgment, should be moved for pending the action, but not be included in the prayer for judgment.

(a) *The Demand should be Explicit.* — While the plaintiff's case does not depend upon his demanding just the kind and measure of relief that the facts he has stated entitle him to, nor will his complaint be held bad for that reason, he should be careful to demand explicitly all the relief the facts may afford him. The codes nearly all provide that “the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded; but in any other case the court may grant him any relief consistent with the case made and embraced within the issue.”³ Hence, it is desirable to have such a demand made as will give the plaintiff all the remedies the case requires, in the event that the defendant default in answering.

(b) *What Relief may be demanded.* — In most actions of a legal nature, a recovery of damages in money only is sought. The demand for judgment in such cases is for the amount of damages claimed and for costs. The following form is usually sufficient: —

¹ Code Ref. 105.

² Id. 260.

³ Id. 105 a.

Wherefore, the plaintiff demands judgment against the defendant for said sum of — dollars [the amount of damages previously alleged in the complaint], and for the costs and disbursements of this action.

In actions to recover specific personal property the demand will be substantially thus : —

Wherefore, the plaintiff demands judgment —

1. For the recovery of the possession of the above-described goods and chattels; or
2. For the sum of — dollars, the value thereof in case a recovery of possession cannot be had; and
3. For the sum of — dollars, the damages [*as previously alleged*] for the unlawful detention thereof;
4. For the costs and disbursements of this action.

In actions to recover possession of real property the demand usually is : —

Wherefore, the plaintiff demands judgment against the defendant —

1. For the recovery of the possession of the above-described premises; and
2. For — dollars, the damages sustained by the plaintiff for the withholding of the same.
3. For the further sum of — dollars, the damages for injury to said premises in the nature of waste [*these recoverable under some codes*].
4. For the rents and profits of the same during such detention [*recoverable in some States*].
5. For the costs and disbursements of this action.

In actions of an equitable nature the demand for judgment varies according to the almost infinite varieties of relief that equitable jurisdiction can give. It may be for accounting, for cancelling a contract or deed, for setting aside a conveyance for fraud or mistake, for re-execution or reformation of an instrument; and for its enforcement

as reformed, or for specific performance, for perpetual injunction, or for the execution of trusts. No special form of words is requisite. In Abbott's or Boone's Forms excellent precedents may be found.

(c) *Demand may be for Alternative Relief.*—The plaintiff may pray for relief in the alternative;¹ that is, for one kind of relief or another, as the court may deem proper.

(d) *Mistaken Demand does not vitiate Complaint.*—The complaint will not be dismissed nor held demurrable because the plaintiff prays for too much or too little, or the wrong relief,² nor because he fails to demand all the relief requisite to a complete and perfect judgment;³ nor does a demand for legal relief exclude him from the equitable relief to which the facts alleged entitle him.⁴

(e) *May demand two or more Kinds of Relief;* but they must be consistent with each other,⁵ or the plaintiff may elect on which he will stand;⁶ and if he demand both legal and equitable relief, when entitled only to the one or the other, it is immaterial.⁷

(f) *Relief in Equitable Actions.*—In an action of equitable character, the court will give the full relief to

¹ Riddle v. Roll, 24 Ohio St. 572; Linden v. Fritz, 3 Sandf. (N. Y.) 468; Young v. Edwards, 11 How. Pr. 201; Reubens v. Joel, 13 N. Y. 488; Lyke v. Port, 65 How. Pr. 298; Hiatt v. Parker, 29 Kan. 765.

² Murtha v. Curley, 90 N. Y. 372; Hall v. Hall, 38 How. Pr. 97; Leonard v. Rogan, 20 Wis. 540; Gibson v. Gibson, 46 Wis. 449; Scheibe v. Kennedy, 64 Wis. 564; Hiles v. Johnson, 67 Wis. 517.

³ Buess v. Koch, 10 Hun, 299.

⁴ Hale v. Bank, 49 N. Y. 626; Sträbe v. Fehl, 22 Wis. 337; Schiffer v. Adams, 13 Colo. 573; 22 Pac. 964; Campbell P'tg Pr. Co. v. Damon, 48 Hun, 509; Davis v. Davis, 9 Mont. 267; 23 Pac. 715.

⁵ Linden v. Hepburn, 5 How. Pr. 188; Ice Co. v. Ins. Co. 21 How. Pr. 296; Wandle v. Turney, 5 Duer, 661.

⁶ Trimble v. Doty, 16 Ohio St. 118.

⁷ Sträbe v. Fehl, 22 Wis. 337.

which the facts alleged and the case entitle the plaintiff, though the relief may be of a legal nature, as courts of equity, "delighting to do complete justice and not by halves," give all the remedy that the case before them demands.¹ This is the rule under the codes.

157. Relief how given. — As the purpose of the codes is to avoid a multiplicity of suits and give full remedies in one action, or any remedy the facts alleged entitle the plaintiff to have, the relief given may be — (1) legal, on facts alleging a legal cause of action; (2) equitable, on facts alleging an equitable cause of action; (3) both legal and equitable, on proper statement showing the right thereto;² (4) either legal or equitable, where facts alleged show both legal and equitable causes;³ (5) legal, where the primary right invaded is equitable;⁴ (6) a personal judgment for a debt, when the establishment of a lien is prayed but not sustained.⁵

¹ Story's Eq. Jur. § 73; Pomeroy's Eq. Jur. 2d ed. §§ 181, 231-242.

² *Laub v. Buckmiller*, 17 N. Y. 620; *Lattin v. McCarty*, 41 N. Y. 107, 109; *Henderson v. Dickey*, 50 Mo. 161.

³ *Bidwell v. Astor Ins. Co.* 16 N. Y. 263; *Phillips v. Gorham*, 17 N. Y. 270; *Ice Co. v. Ins. Co.* 23 N. Y. 357; *Graves v. Spier*, 58 Barb. 349.

⁴ *Marquat v. Marquat*, 12 N. Y. 336; *Barlow v. Scott*, 24 N. Y. 40; *Leonard v. Rogan*, 20 Wis. 540; *White v. Lyons*, 42 Cal. 279. And see Pomeroy's Remedies and Remedial Rights, §§ 76-86, for interesting discussion of this subject. See also *Cuff v. Borland*, 55 Barb. 482; *Sternberger v. McGovern*, 56 N. Y. 12; *Davis v. Morris*, 36 N. Y. 569; but see *Horn v. Ludington*, 32 Wis. 73; *Henry v. Meighen*, 49 N. W. (Minn.) 323; *Eichbrecht v. Angerman*, 80 Ind. 208.

⁵ *Eichbrecht v. Angerman*, 80 Ind. 208; *Edleman v. Kidd*, 65 Wis. 18.

CHAPTER VII.

THE DEMURRER TO THE COMPLAINT OR PETITION.

158. Demurrer defined.—As at common law, the demurrer of the codes is a pleading in which the objecting party, sometimes called the demurrant, signifies that he desires judgment whether he is bound to make answer to the preceding pleading of the adversary, by reason of some objection that he points out, as ground of demurrer.¹ The scope of the demurrer of the codes is somewhat different from that of the common-law system. It reaches to objections to jurisdiction, to disabilities of person, and to defect of parties, which are met, at common law and in equity pleading, by pleas in abatement.² On the other hand, the special demurrer for informality is abrogated; and many defects of a pleading which were formerly ground for special demurrer at law, or exception in equity, are, by the codes, reached by motion to make more definite and certain,³ or to strike out,⁴ or they are disregarded.

159. The Demurrer to the Complaint or Petition.—The provisions, as to the demurrer to the complaint or petition, found in most of the codes, are the following:

The defendant may demur to the complaint (or petition) when it shall appear on the face thereof, either

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or
2. That the plaintiff has not legal capacity to sue; or

¹ Steph. on Pl., Tyler's ed. p. 82.

² Code Ref. 129-132.

³ Id. 299.

⁴ Id. 293, 295.

3. That there is another action pending between the same parties for the same cause ; or

4. That there is a defect of parties, plaintiff or defendant ; or

5. That several causes of action have been improperly united ; or

6. That the complaint does not state facts sufficient to constitute a cause of action.¹*

159 a. Demurrable Objections must appear on the Face of the Complaint, or they must be taken by Answer.² — The demurrer cannot be aided by facts in the record not appearing on the face of the complaint.³ The verification is no part of the complaint.⁴

160. The Demurrer must distinctly state the Grounds of Objection. — This is a statutory requirement in nearly all the States.⁵ But the effect of omitting to so specify is different under different codes. In Arkansas, California, Kansas, Kentucky, Nebraska, Ohio, and Wyoming a demurrer that does not specify the grounds is treated as a

¹ Code Ref. 138-134.

² Id. 129.

³ *Benedix v. Ins. Co.* 78 Wis. 77. But see *Welsh v. Argyle*, 85 Wis. 307.

⁴ 6 How. Pr. 200 ; 5 Hun, 114.

⁵ Code Ref. 143.

* **NOTE.** — In Iowa, Wisconsin, Oregon, Washington, and Oklahoma, it is also ground for demurrer that the action was not commenced within the times limited by law (Code Ref. 135). In New York, by the later code, and in Ohio, misjoinder of parties plaintiff is demurrable (Code Ref. 137). By the codes of California, Colorado, Indiana, Missouri, Nevada, and Utah, misjoinder of either parties plaintiff or defendant is a demurrable fault (Code Ref. 138). The ambiguity, unintelligibility, or uncertainty of the complaint are reached by demurrer in California, Colorado, Idaho, Iowa, Montana, and Nevada (Code Ref. 136). In Iowa it is ground for demurrer that the claim is within the Statute of Frauds, or that a copy of the account or evidence of indebtedness sued on is not attached (Code Ref. 139-140).

demurrer to the sufficiency of the complaint,¹ and will be sustained if the complaint fails to state facts constituting a cause of action.² In Colorado, Idaho, Minnesota, Missouri, Montana, Nevada, New York, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Utah, and Wisconsin, the demurrer will be disregarded and stricken out as a nullity, if it fails to state the grounds.³

161. **Grounds of Objection, how stated.** — The codes generally provide that the grounds of demurrer may be stated in the language of the statute, except as to the objection that there is want of legal capacity to sue, and the objection that there is defect of parties, in which case the defect must be pointed out; and when the ground is that the claim is barred by the Statute of Limitations, the particular statute must be referred to.⁴ The following forms will generally meet code requirements: —

FORM OF DEMURRER.

Title of Cause. }

The above named defendant, by —, his attorney, demurs to the complaint (*or* petition) of the plaintiff herein, and specifies, as ground of objection thereto, that it appears upon the face of said complaint (*or* petition) [*] that the same does not state facts sufficient to constitute a cause of action.

Or (*after the star in preceding*).

that the court has no jurisdiction of the person of this defendant (*or*, these defendants).

Or, —

that the court has no jurisdiction of the subject of the action.

Or, —

that the plaintiff has not legal capacity to sue, in this, to wit [*here point out the incapacity shown by complaint*].

¹ Code Ref. 145, 146.

² Id. 145.

³ Id. 147.

⁴ Id. 143.

Or, —

that there is another action pending between the same parties for the same cause.

Or, —

that there is a defect of parties plaintiff (or defendant) in this action, in this, to wit: [*here state the defect of parties particularly*].

Or, —

[*in the States where the bar of Statute of Limitations is a ground of demurrer*] that this action was not commenced within the time limited by law, by section — of chapter — of the revised statutes (or laws) of this State, passed in the year 18—.

Or, —

[*in the States of California, Nevada, and Utah*] that the said complaint (or petition) is ambiguous, or unintelligible or uncertain.*

162. Demurrer that court has not jurisdiction of the person of the defendant lies when it appears that the person is not subject to the jurisdiction of the court.¹ It does not lie for defective service of the summons or original process,² for that would not appear on the face of the complaint; and if it did, would be cured by a general appearance and demurrer.

163. Demurrer that the court has no jurisdiction of subject-matter lies in all cases (1) where the matter is of political rather than judicial cognizance; (2) where the matter is within the exclusive jurisdiction of some other court, and this fact appears on the face of the com-

¹ Code Ref. 129.

² *Noner v. Ins. Co.* 5 How. Pr. 96; *Ogdensburg, &c. R. R. Co. v. Vermont, &c.* 16 Abb. n. s. 249, 4 Hun, 129.

* NOTE. — As each of these — *i. e.*, ambiguity, unintelligibility, and uncertainty — is a distinct ground of demurrer, a demurrer combining them conjunctively is bad. *Wilhoit v. Cunningham*, 87 Cal. 459.

plaint; (3) where the court is a special one of limited jurisdiction and the matter is not included therein; (4) where the action is local and is not brought in the proper local court, and other courts are denied jurisdiction. But, unless the other courts of general jurisdiction are denied jurisdiction of the particular subject-matter, the proper method under the codes is not to demur for want of jurisdiction, but to demand a change of venue.¹

164. Demurrer that the Plaintiff has not Legal Capacity to sue.—The incapacity may arise (1) from some personal disability, such as infancy, idiocy, coverture (in some jurisdictions), or (2) from want of title to the character in which the plaintiff sues.² So, if it appeared on the face of the complaint that the plaintiff suing as a corporation was not a corporation, demurrer would lie on the ground of want of legal capacity to sue.³ This objection — want of legal capacity to sue — cannot be raised under demurrer that the complaint does not state facts sufficient to constitute a cause of action.⁴ Nor can demurrer lie on this ground when the proper objection is that the complaint fails to state a cause of action.⁵

Where one sues in a representative capacity, and so states the facts as to show that he is not entitled to sue in that capacity, demurrer should be on the ground of such lack.⁶ But the pleading must show the lack. Mere fail-

¹ *Pereles v. Albert*, 12 Wis. 666; *Lane v. Burdick*, 17 Wis. 92; *Woodward v. Hanchett*, 52 Wis. 482.

² *Robbins v. Wells*, 26 How. Pr. 15; *Moir v. Dodson*, 14 Wis. 279.

³ *Bank v. Donnell*, 41 Barb. 571, 40 N. Y. 410.

⁴ *Ins. Co. v. Baldwin*, 37 N. Y. 648; *State v. Tuttle*, 53 Wis. 45; *Saxton v. Seiberling*, 48 Ohio St. 554; *Walsh v. Byrnes*, 39 Minn. 527.

⁵ *People v. Crooks*, 53 N. Y. 648; *Murray v. McGarrigle*, 69 Wis. 483.

⁶ *Meyers v. Machado*, 6 Abb. Pr. 198; *Secer v. Pendleton*, 47 Hun, 281; *Moir v. Dodson*, 14 Wis. 279.

ure to show the legal capacity is not ground for this demurrer;¹ and demurrer on this ground is bad if any one of plaintiffs has capacity.²

165. Demurrer that another Action is Pending between same Parties for same Cause lies when the other action was pending at commencement of the action.³ It must appear (1) that the causes are identical;⁴ (2) that plaintiff and defendant are parties to the other action;⁵ (3) that full relief and complete adjudication can be given in the other action;⁶ (4) that the other action is not for relief which could not be granted in this one.⁷ This demurrer lies though the second action contain special averments, and seeks greater relief without changing the character of the action.⁸ The pendency of another action in a court of the United States or another State is not ground for this objection.⁹

166. Demurrer for Defect of Parties lies for lack, not excess,¹⁰ of parties. If the defect appear on face of complaint, it is waived if not demurred to;¹⁰ and the demurrer must point out the particular defect.¹¹ Demurrant must be prejudiced by the absence of the lacking parties.¹² General demurrer does not raise this objection.¹³

¹ *Bank v. Donnell*, 40 N. Y. 410; *Miller v. Luco*, 80 Cal. 257.

² *O'Callaghan v. Bode*, 84 Cal. 489. ³ *Lee v. Hefley*, 21 Ind. 98.

⁴ *Kelsey v. Ward*, 16 Abb. Pr. 98. See *Bliss' Co. Pl.* § 410.

⁵ *Geery v. Webster*, 11 Hun, 428; *Koch v. Peters*, 97 Wis. 492.

⁶ *Groshon v. Lyon*, 16 Barb. 461. ⁷ *Haire v. Baker*, 5 N. Y. 365.

⁸ *Ward v. Gore*, 37 How. Pr. 119.

⁹ *Wood v. Lake*, 13 Wis. 91; *Burrows v. Miller*, 5 How. Pr. 51; *Stanton v. Embry*, 93 U. S. 548.

¹⁰ *N. Y. etc. R. v. Schuyler*, 17 N. Y. 592; *Hill v. Marsh*, 46 Ind. 218; *Truesdell v. Rhodes*, 26 Wis. 215; *Hoard v. Clum*, 31 Minn. 186; *Dubouque Co. v. Reynolds*, 41 Iowa, 454.

¹¹ *Cunningham v. White*, 45 How. Pr. 486; *Haines v. Hollister*, 64 N. Y. 1.

¹² *Hess v. Nellis*, 65 Barb. 447; *Davidson v. Elms*, 67 N. C. 228; *Murray v. McGarrigle*, 69 Wis. 483; *Newcomb v. Wiggins*, 78 Ind. 1.

¹³ *Newbould v. Warrin*, 14 Abb. Pr. 80. See *Wiltse on Foreclosure*, §§ 325-326; *Stockwell v. Wager*, 30 How. Pr. 271.

167. Demurrer that Several Causes of Action have been Improperly United.—As has been already seen, the plaintiff may unite different causes of action in the same complaint or petition in certain cases. There may happen three forms of misjoinder or improper union of causes of action, viz. :—

1. When different causes of action which may properly be united are alleged not separately, but combined and mingled together in the same count or statement.

2. When different causes which cannot be united are improperly set out in the same complaint and separately stated; as where one cause is of one class mentioned in the codes and the other of another class, the two not being unitable.

3. When different causes, which are not unitable, are improperly united in the same complaint and not separately stated.

To consider these in their order: 1. When two causes of action which may be united in the same complaint are not separately stated but jumbled into one count or statement, demurrer is not the proper mode of objection. A motion should be made to have the pleading made more definite and certain.¹

2. When the causes are of different, non-unitable classes the objection is taken by demurrer. The defendant must demur if the misjoinder is apparent, or he waives the objection. He cannot answer when he may demur.²

3. When the causes of action are non-unitable, by reason of belonging to different classes, and are jum-

¹ *Bass v. Comstock*, 38 N. Y. 21; *Freer v. Denton*, 61 N. Y. 492; *Sentinel Co. v. Thompson*, 38 Wis. 489; *Akerly v. Vilas*, 25 Wis. 703; *Hendry v. Hendry*, 32 Ind. 349; *Hardy v. Miller*, 11 Neb. 395. Otherwise in California, *Canal Co. v. Kidd*, 43 Cal. 180.

² *Blossom v. Barrett*, 37 N. Y. 434; *Mead v. Bagnall*, 15 Wis. 156; *Jamison v. Copher*, 35 Mo. 483; *Mulholland v. Rapp*, 50 Mo. 42; *Savings Society v. Ordway*, 38 Cal. 679; *Keller v. Strong*, 73 N. W. 1071.

bled into one statement, or count, the defendant may demur.¹

168. Who may Demur for Misjoinder of Causes of Action.—1. If the misjoined causes are alleged against all defendants, all may demur.

2. If one cause is alleged against A alone, and another against B alone, either² or both³ may demur for the misjoinder.

3. If one cause of action is alleged against A and B, and another is alleged against A alone or B alone, both⁴ or either⁵ may demur.

4. If A and B join as plaintiffs, and in their complaint allege one cause of action against C in favor of A, and another in favor of B, the misjoinder is improper, and C may demur.⁶ But in some States it is allowed to several lien-holders having individual claims to join in one suit to enforce their liens out of the same property;⁷ and such joinder is also allowed in actions of an equitable nature where the parties, though having distinct interests, have a common interest in the relief sought.

5. If A and B joining in suit allege one cause of action against C in favor of both jointly, and another in favor of each individually, C may demur.⁸

¹ *Wiles v. Snyder*, 64 N. Y. 173; *Goldberg v. Utley*, 60 N. Y. 427; *Wright v. Connor*, 34 Ia. 240.

² *Lull v. Imp'v't Co.* 19 Wis. 100; *Turner v. Duchman*, 23 Wis. 500; *Bush v. Speis*, 5 Hun, 60; *Jackson v. Brookins*, 5 Hun, 530.

³ *Hess v. R. R. Co.* 29 Barb. 391; *Eldridge v. Bell*, 12 How. Pr. 547; *Bronson v. Gifford*, 8 How. Pr. 389; *Stanton v. Ry. Co.* 15 Civ. Proc. R. (N. Y.) 296.

⁴ *Tompkins v. White*, 8 How. Pr. 520.

⁵ *N. C. Land Co. v. Beatty*, 69 N. C. 329; *Pracht v. Ritter*, 16 Jones & Sp. 509.

⁶ *Harsh v. Morgan*, 1 Kan. 293; *Hubbell v. Lerch*, 58 N. Y. 237.

⁷ See *ante*, p. 144.

⁸ *Dailey v. Houston*, 58 Mo. 361.

The above propositions follow from the provision of the codes, that actions to be unital "must" affect all parties to the action."¹

169. Demurrer on Ground that the Complaint or Petition does not state Facts sufficient to constitute a Cause of Action. — This is sometimes, though loosely, called "the general demurrer," as it is thus designated at common law. It cannot here be exhaustively considered, as such consideration would embrace the whole substantive law of right and liability. It may be said, in general analysis, that the complaint may fail to state facts sufficient to constitute a cause of action in one or more of several respects: —

1. It may fail to state facts which show a right in the plaintiff, (a) because the facts as they exist and are alleged are inherently insufficient to create or constitute a right in favor of any one; or (b) because only a part of the facts that exist, and out of which the right arises, are stated, some allegations material to a complete statement of the cause of action being omitted;² or (c) because the facts alleged show the right to be wholly in some other person, a stranger to the action, and not in the plaintiff; or (d) that the right, once existing, has before the commencement of the action been destroyed in some way, and the cause of action once existing has been extinguished; or (e) that the action is brought before the cause of action has accrued.³

¹ Code Ref. 120; *ante*, p. 175.

² *Van Liew v. Johnson*, 6 Thomp. & C. 648; *White v. Brown*, 14 How. Pr. 282; *Johnston Harvester Co. v. Bartley*, 94 Ind. 131; *Leak v. Commrs.* 64 N. C. 132.

³ *Hicks v. Branton*, 21 Ark. 186; *Harvey v. Chilton*, 11 Cal. 114.

* NOTE. — In States where misjoinder of defendants is ground for demurrer, it seems that any party may demur for the misjoinder, as well those properly joined as those who are not.

2. It may fail to show any wrong done by the acts or omissions of the defendant, because (a) the facts existing and alleged are not sufficient to constitute an actionable wrong, or (b) because only part of the existing facts are alleged, and material allegations are omitted; or (c) because the allegations show that the wrong is done to some other person than the plaintiff, or by some other than the defendant.

3. It may show that the liability once existing has been discharged or extinguished in some manner, so that no cause of action is in existence. But usually the bar of the Statute of Limitations, unless made by statute a ground of demurrer, must be pleaded.

4. In Wisconsin, it is recently held that if the plaintiff attempt to set forth a cause in equity and fail to set out such a cause, a demurrer will lie on the ground that no cause of action is stated, although the complaint may contain allegations which, if eliminated and standing by themselves, might be sufficient to constitute a cause of action at law,¹ and may be made *ore tenus*.²

170. General Rules as to Demurrers. — The following general rules as to demurrers under the codes should be borne in mind by the pleader: —

1. *The Demurrer may be to the Whole Complaint or Petition or to any one or more of the several Causes of Action stated therein;*³ but if it is made to the whole pleading it will be overruled, if any of the causes of action therein are good.⁴

2. *It must reach the Whole of a Cause of Action.* — It

¹ Denner v. C. M. & St. P. Ry. Co. 57 Wis. 218.

² Trustees v. Kilbourn, 74 Wis. 452.

³ Code Ref. 149.

⁴ Wheeler v. Ins. Co. 82 N. Y. 543; Hyde v. Supervisors, 43 Wis. 129; Weaver v. Conger, 10 Cal. 233; Armington v. State, 45 Ind. 10; Holbert v. R. R. Co. 38 Ia. 315.

cannot be made to some of the allegations of a cause of action, while as to other allegations the defendant answers.¹ "It is not competent to assail a clause, or several clauses or sentences in a count or petition by demurrer." It "is not a pruning-hook with which to rid a pleading of foreign or impertinent matter; nor is it a sword, with which to attack and cut off redundant averments in a pleading."² The code remedy for such faults is by motion to strike out the redundant matter.³

3. *Where two or more Defendants jointly demur, the Demurrer is bad, if a Cause of Action is stated against any one of them, though not against all.*⁴ It is better in such cases for each defendant to separately demur.

4. *The Demurrant cannot answer and demur to the Same Matter.* — By the demurrer he insists that he is not bound to answer; but if he answer he overrules his own demurrer, unless he elect to waive his answer;⁵ and if both are contained in one paper it should be reformed or stricken from the files.⁶

5. *The Demurrer admits the Facts.* — The rule of the common law is that the demurrer admits all the facts that are well pleaded.⁷ But this is true only in a qualified sense.⁸ The facts are admitted, under the code system, only for the purpose of testing their legal sufficiency;⁹ and the demurrant is not precluded or estopped from afterward

¹ *Ransom v. McClees*, 64 N. C. 17.

² *Hayden v. Anderson*, 17 Ia. 158.

³ Code Ref. 299.

⁴ *People v. Mayer*, 28 Barb. 240; *Teter v. Hinders*, 19 Ind. 93; *McGonigal v. Cotta*, 32 Wis. 614; *Dunn v. Gibson*, 9 Neb. 513.

⁵ *Howard v. R. R. Co.* 5 How. Pr. 206; *Spellman v. Weider*, 5 How. Pr. 5; *Munn v. Barnum*, 12 How. Pr. 563. But Code Ref. 000.

⁶ *Davis v. Hines*, 6 Ohio St. 473; *Smith v. Keating*, 97 Wis. 205.

⁷ Steph. on Pl. s. i. Rule i.; Heard on Civ. Pl. p. 108.

⁸ *Tomkins v. Ashby*, 1 Moody and M. 32; *Ingram v. Lawson*, 9 Car. & P. 326.

⁹ *McKinzie v. Matthews*, 59 Mo. 99.

denying them or avoiding their legal effect by new matter. Upon the argument of the demurrer the facts well pleaded are assumed or conceded to be true; but if the demurrer is overruled, the demurrant is allowed to answer over and may then deny or avoid the facts which stood admitted by his demurrer. Where, however, a demurrer remains on the record, and no other pleading gainsays the matter demurred to, it will be deemed admitted. Hence the practice, both at common law and under codes, of withdrawing a demurrer, when it is not sustained or pressed.¹ But facts ill-pleaded, mere conclusions of law, and immaterial matters are not, for any purpose, admitted by the demurrer;² nor are allegations which are contradicted by annexed exhibits,³ nor matters judicially noticed.⁴

6. "*The Demurrer reaches back to the First Fault.*" — This is the quaint form of stating the rule that upon the argument of a demurrer the court will examine the whole record or series of pleadings and give judgment against the party who was first defective in his pleading.⁵ Hence it is sometimes said that "the demurrer runs through the record." Thus, if the plaintiff demur to the plea or answer of the defendant, the court will give judgment against the plaintiff, however faulty the pleading demurred to may be, if upon looking into the declaration or complaint it is found bad in substance. This rule rests on sound principles and is held in American practice in all the States except Georgia, whose courts refuse to recognize the rule that the demurrer "roves through the whole record."⁶ In the

¹ Chitty on Pl. Perkins, 16th ed. 702, n. x.

² Bonnell v. Griswold, 68 N. Y. 294; Platter v. Seymour, 86 Ind. 323; State v. Veeder, 5 Wis. 339; Freeman v. Hart, 61 Ia. 525.

³ Bush v. Madeira, 14 B. Mon. 212.

⁴ Attorney-General v. Foote, 11 Wis. 14.

⁵ Chitty on Pl. Perkins, 16th ed. p. 701; Steph. on Pl. s. i. Rule i.

⁶ Wynn v. Lee, 5 Ga. 218, 236.

code States, the rule is often applied.¹ A demurrer to an answer or counter claim reaches back to the complaint;² to a reply, to the answer;³ to a cross complaint, to the complaint.⁴ But it does not reach back to such defects as are waived by answering over, but only those of jurisdiction or substance.⁵

170 a. Pleading over without Demurrer. — 1. Objections merely dilatory or in *abatement*, viz.: (a) lack of capacity to sue; (b) pendency of another action; (c) defect of parties; (d) improper joinder of causes of action are waived, if not demurred to or answered when the objection does not appear on the face of the complaint.⁶

2. But objections in *bar*, (a) to the jurisdiction or (b) that the facts stated do not constitute a cause of action may be taken at a later stage,⁷ (1) by demurrer *ore tenus*, or (2) by *motion to dismiss the action*, or (3) by *objection to the introduction of evidence at trial*, or (4) by *motion in arrest of judgment*, after verdict, or (5) by writ of error or appeal.

170 b. Disposal of Demurrer on Argument. — 1. If it be *sustained*, amendment of the complaint is usually allowed, on terms, if the infirmity is in the complaint and not in the facts as they exist.

2. If the demurrer is overruled, the defendant is usually allowed to answer within a limited time on terms, if he desires to do so.

¹ *Allen v. Malcolm*, 12 Abb. N. S. 335; *Harvey v. Brisbin*, 16 State (N. Y.) Rep. 42; *Martin v. McDonald*, 14 B. Mon. 544; *Stratton v. Allen*, 7 Minn. 502; *Ferson v. Drew*, 19 Wis. 225; *Dietrich v. Koch*, 35 Wis. 627; *Trott v. Sarchett*, 10 Ohio St. 241; *Brown v. Tucker*, 7 Col. 30.

² *Lawe v. Hyde*, 39 Wis. 345, 355.

³ *Meniffee v. Clark*, 35 Ind. 304.

⁴ *Hillier v. Stewart*, 26 O. S. 652.

⁵ *Stratton v. Allen*, 7 Minn. 502; *Meniffee v. Clark*, 34 Ind. 304.

⁶ *Post*, p. 301; Code Ref. 148.

⁷ *Bliss' Ann. Code*, § 499, and cases cited.

CHAPTER VIII.

OF THE ANSWER.

SECTION I.

OF CODE PROVISIONS AS TO THE ANSWER.

171. The Answer. — The defendant must “either demur or plead” to the complaint or petition. If he does not find apparent upon the face of the complaint any of the grounds for demurrer which the statute specifies, or any ground for motion to make the complaint more definite and certain, he must serve and file a pleading called “an answer.” This pleading takes the place of the plea in the common-law system and of the answer in the equity system; and the codes go farther than either the old plea or answer in permitting the defendant to set up or plead “a counter-claim;” that is, an independent cause of action existing in his own favor against the plaintiff, by which to diminish, balance off, or exceed the plaintiff’s cause of action, and thereby show himself entitled to affirmative relief.

172. The Code Provisions as to Answers. — With slight verbal changes, the codes provide that “the answer of the defendant must contain: (1) A general or specific denial of each material allegation of the complaint (or petition) controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; (2) A statement of any new matter constituting a defence or counter-claim

(or set-off)* in ordinary and concise language without repetition.”¹

173. Defendant may plead Several Defences or Counter-Claims.—The old rule of the common law, that the defendant could make but one defence though he might have several pleas, does not obtain. The codes provide, with some change of phraseology, that “the defendant may set forth, by answer, as many defences and counter-claims (or set-offs) as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must be separately stated and refer to the causes of action, which they are intended to answer, in such manner that they may be intelligibly distinguished.”² Several codes require them to be numbered.³

174. The Answer analyzed.—Under these code provisions, except in the States whose codes are framed in different language, the answer may contain—

1. A general denial of each and every allegation of the complaint or petition, or
2. A specific denial of some of the material allega-

¹ Code Ref. 151.

² Id. 159-160. In Indiana (§ 365) and Oklahoma (§ 4404) dilatory pleas must be first pleaded and tried.

³ Code Ref. 161.

* NOTE.—In several States following Ohio the words “or set-off” occur after counter-claim (Code Ref. 152). In Missouri, North and South Carolina, the word “general” before denial is left out. In Nebraska the words “general or specific” are omitted before “denial.” Kansas adds: “3. When relief is sought, the nature of the relief to which the defendant supposes himself entitled.” Minnesota adds: “3. All equities existing at the time of the commencement of the action in favor of the defendant therein, or discovered to exist after such commencement, or intervening before a final decision,” etc. For other slight variances in phraseology consult the statutes cited in Code Ref. 151-158.

tions, which the defendant controverts when he cannot controvert the whole.

3. New matter constituting a defence.

4. New matter constituting a counter-claim.¹ The counter-claim is construed in most States to include "the set-off;" in others the statutes expressly speak of "the set-off."²

175. The Matter denied. — The denial, as will be seen from the codes quoted, may be —

1. Of all the material allegations in the complaint, called the general denial.

2. Of some or part of the allegations, called the specific denial.

176. The Nature of the Denial. — The denial may be —

1. Positive and absolute, when the matters alleged are within the personal knowledge of the defendant.

2. Upon information and belief, when the defendant, not having personal knowledge, has information which leads him to believe the allegations untrue.³

3. When he has no knowledge or information on the subject, the defendant may put the plaintiff to his proofs by denying "any knowledge or information sufficient to form a belief."

SECTION II.

OF THE GENERAL DENIAL.

177. The General Denial is employed when the defendant wishes to controvert the whole complaint or petition.

¹ Code Ref. 151.

² Id. 152, and note to par. 177.

³ Pratt Mfg. Co. v. Jordan, &c. Co. 5 Civ. Proc. R. 372; Bennett v. Leeds, &c. Co. 110 N. Y. 150; Taylor v. Smith, 8 N. Y. Supp. 519; Brotherton v. Downey, 21 Hun, 436; 59 How. Pr. 206.

It puts all the material allegations thereof in issue, and the plaintiff to his proof of all of them.

1. *The General Denial must be Positive.* — It does not follow the forms of the plea of the general issue at common law, but uses flat, unequivocal words of denial. It is not good denial to say that "the defendant does not admit,"¹ or, to add to the words of denial the common-law formula, "in manner and form as therein set forth;"² or, the words "as alleged in said complaint or petition."³

2. *It must not be evasive.* — It is bad denial to say the defendant denies each and every *material* allegation of the complaint,⁴ for he assumes to judge of the materiality. A statement of the transaction inconsistent with that given in the complaint does not amount to a denial.⁵ Its fault is argumentativeness; and two affirmatives do not make an issue.⁶

3. *The Form of the General Denial.* — The approved and sufficient form of the general denial is as follows:

Title of Cause. }

The above-named defendant, by —, his attorney, answering the complaint (or petition) of the plaintiff herein, denies each and every allegation thereof.

¹ Bomberger v. Turner, 13 Ohio St. 263.

² Dole v. Burleigh, 1 Dakota, 218; Rumbough v. Imp'v't Co. 106 N. C. 461.

³ Phoenix Ins. Co. v. Meyer, 28 Neb. 124; Schaetzel v. Germantown, &c. Ins. Co. 22 Wis. 412.

⁴ Mattison v. Smith, 19 Abb. Pr. 238; Seward v. Miller, 6 How. Pr. 312; Montour v. Purdy, 11 Minn. 384 (an instructive case); Dodge v. Chandler, 13 Minn. 114. But see contrary in Miller v. Brumbaugh, 7 Kan. 343; and Goodridge v. U. P. R. R. Co. 37 Fed. Rep. 182, as to rule in Colorado.

⁵ West v. Bank, 44 Barb. 175. But see Scott v. Wood, 81 Cal. 398.

⁶ Steph. on Pl. s. v. Rule iii.

Other forms have been sustained as substantially meaning the same thing; but it is always dangerous to laboriously depart from the clear directions of a statute mode of pleading.*

4. *General Denials sufficient.* — When there is a general denial of the allegations of a complaint or petition, special denials are unnecessary.¹ It is also equally superfluous to allege new matter by way of defence which amounts only to a general denial, for such matter can be proved under the general denial.²

5. *The General Denial must not be Argumentative.* — Argumentative pleadings are as faulty under the codes as at common law. A pleading is argumentative when it does not advance its positions in positive form, but leaves them to be collected by argument and inference only.³ A denial or traverse is argumentative when, instead of direct contradiction, it asserts something of an inconsistent nature. To the allegation that A died seised in fee, it is argumentative to assert by way of traverse that he died seised in tail. This is denial by argument or inference only. Such denial is seldom good for any purpose.⁴ The remedy,

¹ Westcott v. Brown, 13 Ind. 83.

² Id.

³ Steph. on Pl. s. v. Rule iii.

⁴ Morris v. Thomas, 57 Ind. 321; Clinton Co. v. Hill, 122 Ind. 215.

* NOTE. — "Says he denies" has been held bad (*People v. Christopher*, 4 Hun, 805; *Arthur v. Brooks*, 14 Barb. 533; *Blake v. Eldred*, 18 How. Pr. 240), and good (*Jones v. Ludburn*, 74 N. Y. 61; *Espinosa v. Gregory*, 40 Cal. 61; *Munn v. Taulman*, 1 Kan. 254). In an action for assault and battery, an answer as at common law, "that the defendant is not guilty of the grievances alleged, etc., or any or either of them, or any part thereof," held sufficient (*Hoffman v. Eppers*, 41 Wis. 251). "The defendant states and shows that he denies each and every allegation," etc., held good, though not commendable in form (*Moen v. Eldred*, 22 Minn. 538). Denial of the complaint in each and every allegation thereof is good (*People v. Tunncliffe*, 26 State Rep. (N. Y.) 60; 17 Civ. Pro. 381).

however, is not by demurrer but by motion.¹ If there be a general and sufficient denial, an added argumentative denial will be stricken out on motion.² If the only denial is merely argumentative, motion to make it more definite and certain.³

6. Nor, in the *alternative*,⁴ nor *hypothetical*, as by stating that if certain allegations of the complaint are so and so, then other facts exist,⁵ or then the defendant denies, etc.*

7. Nor, *conjunctively*, a fault at common law,⁶ by which the traverse is made too large, and it cannot be known what is denied. It is a negative pregnant.

8. *The General Denial may be upon information and belief*, when it must be sworn to and cannot be denied upon personal knowledge. A denial thus, "The defendant answering, . . . upon information and belief denies each and every allegation," is good,⁷ unless the facts are within the defendant's own knowledge⁸ or means of information.⁹

¹ Judah v. Trustees, 23 Ind. 277. ² De Forest v. Butler, 62 Ia. 78.

³ Pom. Rem. & Remedial Rights, § 628.

⁴ Otis v. Ross, 8 How. Pr. 193; Looney v. Orser, 4 Bosw. 391.

⁵ Lewis v. Kendall, 6 How. Pr. 59, 66; Hamilton v. Hough, 13 How. Pr. 14.

⁶ Stephen Pl. Andrews' ed. p. 297; ante, p. 22; Corbin v. George, 2 Abb. 465; Young v. Catlett, 6 Duer, 437.

⁷ Bennett v. Leeds M'fg. Co. 110 N. Y. 150. See also Wadleigh v. Bank, 58 Wis. 546, where denial thus: "The plaintiff alleges upon information and belief that it denies," etc., was held good. See Jones v. Petulama, 36 Cal. 234; Vassault v. Austin, 32 Cal. 597; Macauley v. Printing Co. 5 Civ. Pro. (N. Y.) 430; Brothertown v. Downey, 21 Hun, 436; Sherman v. Boehm, 13 Daly, 42.

⁸ Edwards v. Lent, 8 How. Pr. 282; Kellogg v. Baker, 15 Abb. Pr. 286.

⁹ Ketcham v. Zerega, 1 E. D. Sm. 553; Sherman v. Boehm, *supra*.

* NOTE. — This rule is illustrated by some exceptions, for which see Brown v. Ryckman, 12 How. Pr. 313; Ketcham v. Zerega, 1 E. D. Sm. 553

8. *Denial of Knowledge or Information sufficient to form a Belief.* — When the defendant is ignorant of the facts alleged, having no personal knowledge thereof and no information sufficient to form a belief, he is permitted to put the facts in issue by denying knowledge or information respecting them sufficient to form a belief.¹ But the form of denial must precisely conform to the statute.² Denials of “knowledge sufficient to form a belief,” omitting words “or information” and denials of information omitting the word “knowledge,” have been held bad, and as leaving the facts admitted which were thus attempted to be denied.³ This form of denial is not applicable where the facts are within the knowledge of the defendant,⁴ or are presumed to be within his knowledge.⁵ Such denial, when general, may be in the following form : —

Title of Cause. }

The defendant, by —, his attorney, answering the complaint of the plaintiff herein, for defence thereto, as to the truth of each and every allegation thereof, denies any knowledge or information thereof sufficient to form a belief.

When some of the denials are positive, some on information and belief, and some of knowledge or information sufficient to form a belief, they may be in this form : —

Denies that [*here specify the allegation denied*].

Denies, upon information and belief, that [*here specify the allegation denied*].

Denies any knowledge or information sufficient to form a belief, whether [*here specify the allegation denied in this form*], or

¹ Code Ref. 151.

² *Elton v. Markham*, 20 Barb. 343; *Huns v. Bolles*, 33 How. Pr. 266; *Hastings v. Gwynn*, 12 Wis. 672; *Robbins v. Lincoln*, 12 Wis. 1.

³ See cases above cited. *Gas Co. v. San Francisco*, 9 Cal. 453; *Humphrey v. Call*, 9 Cal. 59.

⁴ *Collart v. Fisk*, 38 Wis. 238; *Edwards v. Lent*, 8 How. Pr. 28.

⁵ *Fales v. Hicks*, 12 How. Pr. 153; *Beebe v. Marvin*, 17 Abb. Pr. 194; *Wing v. Dugan*, 8 Bush (Ky.), 583.

Alleges that he has no knowledge or information sufficient to form a belief whether [*here specify allegation thus controverted*].¹

9. *The General Denial must be Specific.* — It must always appear what the pleader intends to deny. When he “unqualifiedly denies” each and every allegation of the complaint or petition, there is no room for question.

178. *What may be proved under a General Denial.* — The defendant under a general denial may give in evidence anything which tends directly to disprove the plaintiff's allegations or wholly or in part to contradict or disprove any fact which the plaintiff must establish to make out his case. The subjoined note affords a few illustrations of the doctrine.*

¹ See also Boone's Forms, Code Pldg. p. 31, and cases cited.

* NOTE. — *Want of consideration of note not negotiable or contract not under seal can be shown under general denial, as show the plaintiff never had a cause of action.* Evans v. Williams, 60 Barb. 346; Bonduant v. Bladen, 19 Ind. 160, or a different consideration from that alleged by plaintiff, Wheeler v. Williams, 38 N. Y. 263; but see Du Bois v. Hermance, 56 N. Y. 673; Weaver v. Barden, 49 N. Y. 286.

Where plaintiff avers title in himself, evidence to show title in defendant is admissible under general denial. — This applies in ejectment (Marshall v. Shafter, 32 Cal. 176; Bruck v. Tucker, 42 Cal. 346); and in trover (Brevoort v. Spencer, 8 Jones & Sp. 211); and in replevin (Schulenberg v. Harriman, 21 Wall. 59; Caldwell v. Bruggerman, 4 Minn. 270). And defendant may show that the plaintiff, before suit brought, had assigned the cause of action to another (Wetmore v. San Francisco, 44 Cal. 294). See Bliss' Ann. Code, § 500 n.

In action for services, defendant under general denial may show that services were a gratuity, or for a sum fixed by plaintiff less than he claims, or that compensation was contingent (Schermerhorn v. Van Allen, 18 Barb. 29); or plaintiff's negligence and want of skill may be proved to show that the services were of less value than claimed, or of no value (Bridges v. Payson, 13 Cal. 640; Raymond v. Richardson, 4 E. D. Sm. 171); but under mere denial of value, defendant can-

SECTION III.

OF THE SPECIFIC DENIAL.

179. The specific denial, as has been seen,¹ is of some material allegation of the complaint or petition, which the defendant wishes to controvert, where he cannot deny all that the plaintiff has alleged. Of these denials, it may be said generally that —

1. *They must be specific, direct, and precise*, clearly indicating the matter denied,² and not argumentative, nor containing a negative pregnant.³

2. *They must controvert material* allegations. The denial of redundant, superfluous, irrelevant matter creates no issue;⁴ but as at common law, where there are several material allegations, the pleader may deny which he pleases,⁵ if he can verify his denial when it is required to be verified.⁶

¹ *Ante*, p. 22.

² *Ante*, p. 35.

³ *Ante*, p. 34.

⁴ *Drake v. Cockroft*, 4 E. D. Sm. 34; *Yates v. Birch*, 87 N. Y. 409; *Racouillat v. Rene*, 32 Cal. 450; *Wells v. McPike*, 21 Cal. 215.

⁵ *Steph. on Pl. s. ii. Rule i.*

⁶ *Code Ref.* 225, 226.

not show services were not rendered (*Van Dyke v. Maguire*, 57 N. Y. 429).

In *actions of tort for negligence*, contributory negligence of plaintiff may be shown under general denial. *Schaus v. Manhattan Gas Co.* 14 Abb. Pr. n. s. 371; *Indianapolis, &c. R. R. v. Rutherford*, 29 Ind. 82. But as to rules and special cases, in different States, as to pleading and proving contributory negligence, see *Boone's Code Pleading*, §§ 174, 175.

Circumstances in mitigation of damages should as a rule be specially pleaded as a partial defence. The common-law rule is that, while a partial defence cannot be pleaded, facts in mitigation of damages might be given in evidence under the general issue. This is held to be the rule in some code States; but the more general and better rule is that they should be specially pleaded. See *Pom. Rem.* §§ 692-696 *post*, p. 235. For N. Y. rule, see *Catlin v. Adirondack Co.* 12 W. Dig. 4.

3. *The Denials should not be too Large, nor too Narrow.*—This means that they should not include in the denial (1) matter not alleged with that which is alleged, (2) nor immaterial with material matter, (3) nor matters of time, place, and circumstance, (4) nor deny matters in the conjunctive, instead of the disjunctive, where the allegation denied is not required to be proved conjunctively.¹ Thus, if it be alleged that A converted the horse and mule of B, a denial that he converted the horse and mule is bad.² The denial should be “that he converted the horse or mule, or either of them.”

4. *They should be of issuable matter*; that is, such matter as the plaintiff must prove in order to maintain his action.³ Hence, (a) denials of time,⁴ place,⁵ quantity,⁶ or value,⁶ are not sufficient, unless these matters are, in the particular case, material and issuable.⁷ (b) Denials should not be of matter merely of inducement,⁸ unless it is material and issuable, as in good code pleading it ought to be, if inserted. (c) Nor, should they be of matter merely in aggravation.⁹ Such matter is not admitted by omission

¹ Steph. on Pl. s. ii. Rule i.

² Moser v. Jenkins, 5 Ore. 447; Fitch v. Bunch, 30 Cal. 209; Leroux v. Murdock, 51 Cal. 541; Young v. Catlett, 6 Duer, 437; Shearman v. N. Y. Cent. Mills, 1 Abb. Pr. 187; but see Jones v. Eddy, 90 Cal. 147, where denial that defendant “assumed and agreed to pay” was held not in the conjunctive, because the words meant the same thing.

³ Code Ref. 254.

⁴ Woodruff v. Cook, 25 Barb. 505; Davidson v. Powell, 16 How. Pr. 467.

⁵ Davidson v. Powell, 16 How. Pr. 467.

⁶ Lynd v. Pickett, 7 Minn. 184; Field v. Barr, 27 Mo. 416; Jenkins v. Steanka, 19 Wis. 126.

⁷ Maxwell on Code Pl. 388.

⁸ Bliss on Code Pl. § 149.

⁹ Schnaderbeck v. Worth, 8 Abb. Pr. 37; Lane v. Gilbert, 9 How. Pr. 150; Gilbert v. Rounds, 14 How. Pr. 46; Moloney v. Dows, 15 How. Pr. 261, 265; Powers v. Rome, &c. R. Co. 3 Hun, 285.

to deny it.¹ (d) Nor, of mere conclusions of law.² Hence, where facts are alleged showing malice or fraud, no issue is raised by merely denying the malice³ or fraud.⁴ Where facts are alleged showing an indebtedness, denial of the indebtedness is insufficient.⁵ So of any other mere inference or conclusion of law.⁶ (e) Nor, of damages, whether general or special.* (f) Nor, of matter not alleged,⁷ unless it be such as is necessarily implied.⁸ (g) Nor, should

¹ *Field v. Barr*, 27 Mo. 416; *Pom. Rem.* § 617; *Raymond v. Traffarn*, 12 Abb. Pr. 52.

² *Pierson v. Cooley*, 1 Code Rep. 91; *Seeley v. Engell*, 17 Barb. 530; *Emery v. Baltz*, 94 N. Y. 408; *Phillips' Code Pl.* § 343.

³ *Fry v. Bennett*, 5 Sandf. 54.

⁴ *Robinson v. Stewart*, 10 N. Y. 189.

⁵ *Haggard v. Hay's Adm'r*, 13 B. Mon. 175; *Clark v. Finnell*, 16 B. Mon. 329; *Wells v. McPike*, 21 Cal. 215. But see *Morrow v. Cougan*, 3 Abb. Pr. 328. Where the allegation is only that the defendant "is indebted," a denial of indebtedness is good. See 31 Pac. R. 1167.

⁶ *Frost v. Harford*, 40 Cal. 165; *Felch v. Beaudry*, 40 Cal. 439; *Dimon v. Dunn*, 15 N. Y. 498; *Nolen v. Skelley*, 62 How. Pr. 102; *Baldwin v. Tel. Co.* 54 Barb. 505.

⁷ *Steph. on Pl. s. i. Rule i.*

⁸ *Prindle v. Caruthers*, 15 N. Y. 425, 429; *Marie v. Garrison*, 83 N. Y. 14; *Bellinger v. Craigue*, 31 Barb. 534; *Lord v. Chesebrough*, 4 Sandf. 696.

* **NOTE.** — The statement of the amount of damages is, in some jurisdictions, deemed an issuable fact (*Tucker v. Parks*, 7 Col. 62; *Cole v. Hoeburg*, 36 Kan. 263; *Patterson v. Ely*, 19 Cal. 28; *Dimick v. Campbell*, 31 Cal. 238; *Carlyon v. Lannon*, 4 Nev. 156; *White v. N. W. Stage Co.* 5 Ore. 99; *Hudson v. Road Co.* 45 Cal. 550). In others not (*Newman v. Otto*, 4 Sandf. 668; *Jenkins v. Steanka*, 19 Wis. 126; *Bartelt v. Braunsdorf*, 57 Wis. 1; *Thompson v. Lumley*, 7 Daly, 74; *McLees v. Felt*, 11 Ind. 218; *Raymond v. Traffarn*, 12 Abb. Pr. 52; *Connors v. Meir*, 2 E. D. Sm. 314; *McKensie v. Farrell*, 4 Bosw. 192; *Woodruff v. Cook*, 25 Barb. 505). The doctrine of these cases which hold damages not an issuable fact is — (1) That averments of damages are not issuable; (2) That they are not admitted by failure to deny them; (3) That the defendant without denying may give evidence on the assessment to mitigate the damages, or to show that none were suffered.

it deny language of a contract alleged, without denying substance.¹ (h) Nor, should matter which is new and defensive be pleaded by way of denial.²

Denial of all allegations "except such as are admitted," is an objectionable,³ "vicious, and slovenly"⁴ style of pleading. It is held good when certain allegations are specifically admitted; but in a good, scientific code pleading, no allegations are ever expressly admitted. The way to admit them is to pass over them without denial.⁵

Denials of allegations contained in certain lines or folios, or between them, or in certain numbered paragraphs, are held good by several authorities;⁶ but the form is objectionable, and leads to confusion when the answer is incorporated in a case on appeal; and there a different arrangement of folios is made necessary. It is slovenly, and in some courts held not in compliance with the statute.⁷

Some Statutory Rules as to Denials. — In a few States certain allegations of a complaint, petition, or other pleading are taken as true unless denied specially; and the denial, in some States, must be verified. These are allegations of (1) corporate existence;⁸ (2) partnership;⁹

¹ *Dimon v. Dunn*, 15 N. Y. 498.

² *Sherwood v. Gardner*, 5 Civ. Pro. 239.

³ *Maxwell on Code Pl.* § 388.

⁴ *Pom. Rem. & R. R.* §§ 633-636.

⁵ *Code Ref.* 255, 256.

⁶ *Gassett v. Cracker*, 9 Abb. Pr. 39; *Blake v. Eldred*, 18 How. Pr. 240; *Brown v. Cooper*, 89 N. C. 237.

⁷ *Collins v. Singer Mfg. Co.* 53 Wis. 305; *Caulkins v. Boulton*, 98 N. Y. 514.

⁸ *Minn.* § 4796; *N. Y.* 2 R. S. 457, § 3, as to domestic corporations; *Kansas*, § 4191, *Indiana*, § 365, *Iowa*, § 3923, *Chance v. R. R. Co.* 32 Ind. 472; *Wisconsin*, as to domestic or foreign, R. S. § 4199, *Williams v. Smith*, 33 Wis. 530; *Oklahoma*, § 4404.

⁹ *Minn.* § 4799; *Kan.* § 4191; *Wis.* § 4197.

(3) representative capacity;¹ (4) the execution or signatures to deeds or written instruments;² (5) indorsement;³ (6) correctness of verified account;⁴ (7) dilatory pleas,⁵ such as pleas in abatement.

SECTION IV.

OF THE DEFENCE OF NEW MATTER.

180. What is New Matter. — New matter in an answer is such as is not embraced within the statements of the plaintiff's complaint or petition, and the proving of which does not disprove any of the plaintiff's allegations of fact. It differs from denial in this: a denial merely denies the existence of facts; a defence of new matter assumes the plaintiff's averments to be true, and states other facts which avoid or defeat the liability which the plaintiff's statements, taken alone as true, establish.

Under the former system the plea in confession and avoidance must give color.⁶ The technical rules as to giving color do not reappear in the code system; but the new matter in confession and avoidance, which the codes permit to be pleaded, impliedly gives color, by assuming the plaintiff's allegations to be true. The defendant does not confess in terms, but merely omits to deny.⁷

181. Of what New Matter may consist. — New matter, as has been stated, may consist of (1) matter consti-

¹ Ind. § 305; Ia. § 3923; Kan. § 4191; Okla. § 4404.

² Ind. § 364; Kan. § 4191; Mont. §§ 97, 98; Okla. § 4403; Utah, § 3235; Wis. § 4198.

³ Kan. § 4191.

⁴ Kan. § 4191.

⁵ Ind. § 365; Okla. § 4404; N. Y. § 513.

⁶ Steph. on Pl. s. i. Rule ii. par. 3.

⁷ *Morgan v. Hawkeye Ins. Co.* 37 Ia. 359.

tuting a defence; (2) of matter constituting a counter-claim.¹

182. Defence is defined to be that which is alleged by a party proceeded against in an action or suit, as a reason why the plaintiff should not recover or establish that which he seeks by his complaint or petition.²

183. The Defendant may plead Several Defences.—The codes all permit the defendant to plead as many defences as he may have. They go further than the statute of 4 Ann. c. 16, which permitted the defendant to plead as many defences *in bar* only as he might have.³ The codes all permit the defendant to plead —

1. *As many legal defences as he may have*, whether in *abatement* or *bar*. They are combined in the same answer, but if pleaded both in *abatement and bar*, the latter plea overrides the former.⁴

2. *As many equitable defences as he may have*, whether the action be legal or equitable.

3. *Both legal and equitable defences*, whether the action be legal or equitable.⁵ This union, which was deemed impossible under the former system, is one of the leading principles of the code.⁶

4. *Whole defences or partial defences*.—While a partial defence could not be pleaded at common law,⁷ it is held in the code States that it may be pleaded *as such*, but must not be set up as a complete defence,⁸ and must

¹ Code Ref. 151.

² Black's Law Dic. Defence.

³ Steph. on Pl. s. iii. Rule i.

⁴ *Bridge v. Payson*, 5 Sandf. 210; *Sweet v. Tuttle*, 14 N. Y. 465; Code Ref. 159. But see Ind. Code, § 365; Okla. § 4404; 50 Wis. 271.

⁵ Code Ref. 159.

⁶ Id.

⁷ Pom. Rem. § 608; Gould on Pl. § 98.

⁸ *Fitzsimmons v. Ins. Co.* 18 Wis. 234; *Davenport, & Co. v. Davenport*, 15 Ia. 6; *Ward v. Polk*, 70 Ind. 309.

be stated to be partial,¹ or the defence is demurrable.² In New York it is expressly allowed to plead partial defences.³ Elsewhere it is allowed generally; but a partial defence when pleaded as a whole one is not good for either purpose.⁴

184. As to Consistency of Defences.—At common law defences might be pleaded which were repugnant to or inconsistent with each other, except that the plea of the general issue and the plea of tender were so inconsistent that they were disallowed.⁵ By the rules of equity pleading, defences must be consistent.⁶ Under the codes, it may be said, as the result of numerous and somewhat conflicting decisions, that (1) defences so inconsistent that, if the statements in one are true, those of the other must be false, cannot be pleaded together;⁷ (2) that defences which both may be true, though inharmonious, may be pleaded together.⁸ Where

¹ N. Y. Code Proc. § 508.

² Same cases: *Reynolds v. Roudabush*, 59 Ind. 483. But otherwise in Ohio, *Peebles v. Isaminger*, 18 Ohio St. 490.

³ N. Y. Code Pro. § 508.

⁴ *Fitzsimmons v. Ins. Co.* 18 Wis. 234; *Adkins v. Adkins*, 48 Ind. 12, 17; *Reynolds v. Roudabush*, 59 Ind. 483. Otherwise, it seems, in Ohio, *Peebles v. Isaminger*, 18 Ohio St. 490, in equitable action.

⁵ Steph. on Pl. s. iii. Rule i.

⁶ *Hopper v. Hopper*, 11 Paige, 46.

⁷ Instances of inconsistent defences: denial of execution of contract and its execution under duress, *Wright v. Batcheller*, 16 Kan. 259; denial of contract and allegation that the adverse party had not performed his part of it, *Lewis v. Acker*, 11 How. Pr. 163; denial by carrier that he was shipper, and allegation that the goods shipped were delivered, *Arnold v. Dimon*, 4 Sandf. 680; denial and tender, *Livingston v. Harrison*, 2 E. D. Sm. 197. See 44 Mo. 596.

⁸ Instances of defences held consistent: denial of execution of note and its payment or release, *Kellogg v. Baker*, 15 Abb. Pr. 286; *Nelson v. Brodhack*, 44 Mo. 596; rescission of contract and breach of warranty, *Bruce v. Burr*, 67 N. Y. 237; denial of slanderous words and justifica-

the inconsistency arises rather by implication of law, from the new matter being in the nature of a plea in confession and avoidance, for the purpose of the particular defence, than from statements directly contradictory, the defences are not inconsistent.¹ See 13 Minn. 426 ; 95 Wis. 592.

185. How the New Matter should be alleged.—The codes usually read that the statement of new matter shall be in “ordinary and concise language without repetition.”² The rules applicable to the statement of the cause of action in the complaint or petition, as heretofore given, apply as well to the statement of facts constituting a defence or counter-claim. Material, issuable facts should be alleged, not conclusions of law nor evidentiary matter, with the same positiveness, certainty, and observance of the established rules of statement that are required in the complaint.

186. Defences to be separately stated.—Such is the requirement of all the codes;³ and part of them require them to be numbered, which is good practice, whether required by statute or not; and some court rules require it in some States where the statutes do not.⁴ They must also “refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.”

187. Form of Answers.—The answer, as to formal parts, may be in the following or similar form:—

tion pleading that they are true, *Stiles v. Comstock*, 9 How. Pr. 48. In replevin from sheriff, denial of plaintiff's property and possession, and justification that it was seized as property of a third person, who had conveyed to plaintiff in fraud of creditors, *Billings v. Drew*, 52 Cal. 565. See *Hartwell v. Page*, 14 Wis. 49; *B'k v. Clossen*, 29 O. S. 78.

¹ *Bell v. Brown*, 22 Cal. 671.

² Code Ref. 151.

³ *Id.* 160.

⁴ *Id.* 161.

State of —, } In (Circuit) Court.
— County. }
A B, Plaintiff, }
vs. } Answer.
C D, Defendant. }

The above named defendant, by —, his attorney, answering the complaint of the plaintiff herein —.

I.

For a first defence to the first cause of action sought to be alleged therein, denies each and every allegation in the statement thereof in said complaint.

II.

For a second defence to said first cause of action, the defendant alleges (upon information and belief) that [*here state the new matter constituting the defence*].

III.

And for a first defence to the second cause of action sought to be alleged in said complaint, the defendant denies specifically the allegation that [*here specify matter denied, avoiding conjunctive denial, etc.*].

IV.

And for a second defence to said second cause of action, the defendant alleges that [*here state the new matter of the defence*].

V.

And for a first defence to the third cause of action sought to be alleged in said complaint, the defendant denies any knowledge or information sufficient to form a belief as to any or either of the matters alleged therein (*or, alleges that he has no knowledge or information sufficient to form a belief, as to the truth of any or either of the allegations therein contained*).

VI.

And for a counter-claim to all said causes of action the defendant alleges [*here state the facts constituting the counter-claim, and close with demand for judgment thus*]. —

Wherefore, upon said counter-claim, the defendant demands judgment that [*here state the affirmative relief that the defendant supposes himself entitled to*].

[Signature]

Def't's Attorney.

Verification.

188. No demand of judgment necessary¹ where no counter-claim is pleaded, as was usual in common law and equity pleading.² It was so usual in the former practice that many pleaders conclude an answer with the words, "Wherefore, the defendant prays that he be hence dismissed with his costs, etc.," or some similar formula. This need never be used in an answer which simply sets up denial or mere defence.

189. Each Defence must be Complete in Itself.³—Its defective or incomplete averments cannot be helped out by those of other separate defences set up in the same answer,⁴ unless expressly referred to and by apt words adopted and made part of the statement.⁵

When tedious repetition may be avoided by the reference to and adoption of a statement in a preceding defence, the form of words used in doing so may be in substance as follows:—

And for a (second) and separate defence to the (first) cause of action alleged in said complaint (or petition), the defendant, here referring to, adopting as, and making part of, this defence, all the allegations of the preceding defence, as fully as if here repeated, respecting (the execution of said deed, or the said

¹ *Bridge v. Payson*, 5 Sandf. 210; *Bendit v. Annealey*, 42 Barb. 192. Code Ref. 157.

² Steph. on Pl. s. vi. Rule viii.

³ *Bridge v. Payson*, 5 Sandf. 210; 22 Barb. 326; *Bank v. Green*, 33 Ia. 140.

⁴ *Catlin v. Pedrick*, 17 Wis. 88; *Lynn v. Crim*, 96 Ind. 89.

⁵ *Baldwin v. U. S. Tel. Co.* 54 Barb. 517; *Hammond v. Earle*, 58 How. Pr. 426; *Ayrault v. Chamberlin*, 33 Barb. 229.

partnership agreement) [*or other matters to be distinctly and precisely referred to*], further alleges, etc.

190. Each defence must be a complete answer to the whole cause of action it is intended to answer,¹ unless it is stated to be a partial defence.²

191. **When New Matter Necessary.**—Whether new matter must be pleaded or not, in order to let in proof of the facts, depends largely upon the frame of the complaint. Thus, if a complaint allege that a note is due, payment must be alleged as new matter;³ but if the complaint allege that the note has not been paid, a general denial puts in issue the fact of payment, and the defendant on the trial may prove it, in order to disprove the averment in the complaint of non-payment.⁴ When payment is pleaded, the time of payment must be alleged.⁵

192. **Defences which must be pleaded as New Matter.**—As has been shown, the following classes of defences must be pleaded as new matter: (1) Those which show that, notwithstanding the facts alleged in the complaint are true, yet that other facts also exist which establish that no cause of action ever arose out of the matters stated in

¹ *Fitzsimmons v. Ins. Co.* 18 Wis. 234; *Babb v. Mackey*, 10 Wis. 371; *Everroad v. Schwartzkopf*, 123 Ind. 35.

² *Ward v. Polk*, 70 Ind. 309; *Peck v. Parchin*, 52 Ia. 46. *Ante*, par. 163.

³ *McKyring v. Bull*, 16 N. Y. 267; *Knapp v. Runals*, 37 Wis. 135; *Shipman v. State*, 43 Wis. 381; but see *Boone's Code* Pl. § 67; *Pierce v. Early*, 79 Ia. 199.

⁴ *Pom. Rem.* §§ 665, 700; *Marley v. Smith*, 4 Kan. 186; and see *Frisch v. Caler*, 21 Cal. 71; *Farmers' Bank v. Sherman*, 33 N. Y. 69; *White v. Smith*, 46 N. Y. 418; otherwise in *Indiana*, *Hubler v. Pullen*, 9 Ind. 273; *Baker v. Kistler*, 13 Ind. 63.

⁵ *O'Neal v. Phillips*, 83 Ga. 556. Payment after commencement of suit must be shown by supplemental answer. *Hawes v. Woolcock*, 30 Wis. 213.

such complaint. The new matter may be (a) facts showing justification or excuse for the acts complained of as wrongful, as where an officer sued for an act justifies under his writ,¹ or where one sued in a civil action for damages for assault and battery pleads *son assault de meisme*,² or one sued in trespass pleads license to enter the premises;³ (b) fraud on the plaintiff's part in the transaction,⁴ or duress,⁵ which relieves the defendant from liability; (c) facts which show the contract sued upon voidable or void, by statute,⁶ as the Statute of Frauds,⁷ for usury,⁸ etc., or because of the infancy,⁹ coverture,¹⁰ or other disability of the defendant,¹¹ or, for want of consideration in negotiable instruments or instruments under seal,¹² or, void as in restraint of trade.¹³ (2) Those which show that although the plaintiff once had a cause of action, yet some events have occurred subsequent to its creation,

¹ Steph. on Pl. a. i. Rule i. § 11, part 2.

² Id.

³ *Beaty v. Swarthout*, 32 Barb. 293; *Snowden v. Wilas*, 19 Ind. 10.

⁴ *Gifford v. Carrolle*, 29 Cal. 589; *Daly v. Proetz*, 20 Minn. 411; *Goodwin v. Mass. Ins. Co.* 73 N. Y. 480; *Leavitt v. Cutler*, 37 Wis. 46.

⁵ *Conn. Life Ins. Co. v. McCormick*, 45 Cal. 580; *Richardson v. Hittle*, 31 Ind. 119; *Bank v. Bryan*, 62 Ia. 42.

⁶ *Finley v. Quirk*, 9 Minn. 194; *Denton v. Logan*, 3 Metc. (Ky.) 434; *O'Toole v. Garvin*, 1 Hun, 92.

⁷ The Statute of Frauds may be interposed (1) by denying the agreement sued on; (2) by admitting the allegations, but alleging facts showing agreement is within the statute, *Moak's Van Santvoerd's Pl.* 3d ed. 555.

⁸ *Baker v. Bailey*, 16 Barb. 57; *Morford v. Davis*, 28 N. Y. 481; *Western Trans. Co. v. Kilderhouse*, 430.

⁹ *Rush v. Wick*, 31 Ohio St. 521; *Roe v. Angevine*, 7 Hun, 679.

¹⁰ *Baker v. Bailey*, 16 Barb. 57; *Dillaye v. Parks*, 31 Barb. 132; *Smith v. Dunning*, 61 N. Y. 249; *Stevens v. Bostwick*, 2 Hun, 423.

¹¹ *Whitman v. Lake*, 32 Wis. 189.

¹² *Frybarger v. Cokefair*, 17 Ind. 404; *Dubois v. Hermance*, 56 N. Y. 673. See *ante*, p. 234 n.

¹³ *Prost v. More*, 40 Cal. 347.

which have destroyed, extinguished, or merged the right of action thereon. These may, among others, be (a) *Accord and satisfaction*; that the parties had agreed upon some other method of satisfying the claim or demand of the plaintiff, and that defendant had executed the accord, thus satisfying it, and discharging his liability;¹ (b) *Arbitration and award*; that the parties had submitted the matter in difference to arbitrament, and an award had been made thereon;² (c) *Discharge in bankruptcy* or insolvency;³ (d) *Release of the cause of action*;⁴ (e) *Payment*,⁵ when not provable under general denial;⁶ (f) The Statute of Limitations, which must be pleaded in bar as new matter,⁷ except where, in some jurisdictions, it is ground of demurrer, if on the face of the complaint it appears that the cause is barred by the statute.⁸ (3) Those which show that the plaintiff is *estopped* from alleging what he alleges, or claiming what he claims, by reason of having alleged or done something previously,⁹ which precludes him from now alleging or denying the contrary.¹⁰

193. New matter not pleaded cannot be given in evidence at the trial,¹¹ if the defendant has had opportunity to

¹ *Coles v. Soulsby*, 21 Cal. 47, 50; *Piercy v. Sabin*, 10 Cal. 30; *Jackson v. Olmstead*, 87 Ind. 92; *Hall v. Smith*, 15 Ia. 584.

² *Brazil v. Isham*, 12 N. Y. 9, 17. As to pleading an award, see *Morse on Arbitration*, p. 590.

³ *Codd v. Rathbone*, 19 N. Y. 37; *Cornell v. Dakin*, 38 N. Y. 253.

⁴ *Johnson v. Kerr*, 1 S. & R. 25.

⁵ *McKyring v. Bull*, 16 N. Y. 297; *Knapp v. Runals*, 37 Wis. 135.

⁶ *Ante*, p. 245.

⁷ *Bliss on Code Pl. § 355*; *Boone on Code Pl. § 69*.

⁸ *Code Ref. 135*.

⁹ *Steph. on Pl. a. l. Rule i.*

¹⁰ *Wood v. Ostram*, 29 Ind. 177; *Clark v. Huber*, 25 Cal. 593; *Warder v. Baldwin*, 59 Wis. 459.

¹¹ *Paige v. Willett*, 38 N. Y. 28; *Sanford v. Travers*, 7 Bosw. 498; *Glazer v. Cleft*, 10 Cal. 303; *Johnson v. Ball*, 74 N. C. 355; *R. R. Co. v. Washburn*, 5 Neb. 123.

plead to it. But this proposition does not apply to new matter which by the codes is deemed controverted.¹

194. Special Statutory Rules as to New Matter.—The codes all contain some provisions as to pleading new matter in answers which may here be summarized.

In *libel and slander*, the defendant may, in his answer, allege (a) the truth of the matter charged as defamatory, and (b), any mitigating circumstances to reduce the amount of damages.² These at common law could be given in evidence under the general issue.³ The courts of Indiana and Iowa still adhere to the old rule.⁴ So, by statute in Ohio.⁵ Elsewhere, it is generally required that the mitigating circumstances be pleaded.⁶

Mitigating circumstances generally in other actions should be specially pleaded as a partial defence.⁷ This is required by statute in New York.⁸ But there are many departures from this rule to be found in the authorities.

SECTION V.

OF THE COUNTER-CLAIM.

195. The Counter-claim is defined to be a cause of action existing in favor of the defendant and against the plaintiff, which the former pleads to diminish, defeat, or

¹ See *post*, par. 209.

² Code Ref. 232.

³ *Smithies v. Harrison*, 1 Lord Raym. 727.

⁴ *O'Conner v. O'Conner*, 27 Ind. 69; *Beardsley v. Bridgman*, 17 Ia. 290.

⁵ Ohio Code, § 5094.

⁶ *Spooner v. Keeler*, 51 N. Y. 527; *Willlover v. Hill*, 72 N. Y. 36; *Lick v. Owen*, 47 Cal. 258; *Wilson v. Noonan*, 35 Wis. 321; *Langton v. Hagerty*, Id. 151; *Reiley v. Timme*, 53 Wis. 63.

⁷ *Maxwell on Code Pl.* p. 481; *Pom. Rem.* § 695.

⁸ N. Y. Code Proc. § 536.

otherwise affect the plaintiff's claim. The counter-claim differs from defence in this: defence goes merely to defeat the plaintiff's recovery by some matter which shows that he has no right to recover; the counter-claim sets up a cause of action on which the defendant has a right to recover. He might have brought an independent action upon it against the plaintiff; and by pleading it in the plaintiff's action he seeks affirmative relief of such nature that it will operate to cut down, balance, diminish, overcome, or otherwise affect the plaintiff's claim, and give defendant an affirmative judgment for anything he is entitled by his counter-claim.

To illustrate: A sues B on a contract by which it appears that \$1,000 is due from B to A. Let it be supposed that B in his answer (1) denies the making of the contract, (2) pleads as new matter of defence that the plaintiff has released him from liability on the contract, and (3) pleads as a counter-claim that the plaintiff owes him upon another contract, the facts as to which he fully states as if he were stating them in a complaint, the sum of \$2,000, for which he demands judgment, with costs. On the trial, the defendant may (1) under his denial disprove that the contract was ever made, or (2) prove affirmatively that the release pleaded had been executed. Either of these defences, if established, of course defeats the plaintiff's claim. But (3) the defendant may go farther, and prove his demand against the plaintiff for the \$2,000, and may recover it, with costs.

But suppose that, on the trial, the defendant fails in his defences of denial and release, but prevails in his counter-claim. The plaintiff's claim is then established for \$1,000, the defendant's for \$2,000. Defendant's counter-claim is then applied to extinguish the plaintiff's claim, and the excess of \$1,000 is the amount of the verdict for the defendant, on which judgment is awarded. The claim and

counter-claim are thus adjudicated in one action, and all future controversy respecting either is concluded.

196. The Code Provisions as to Counter-claims.— There are somewhat variant statutory provisions as to counter-claims in the several codes. The more common provisions are: The counter-claim must be one existing in favor of a defendant, and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:—

1. A cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action arising on contract, express or implied, and existing at the commencement of the action.¹*

197. The Set-off.— Before considering the counter-claim, a brief reference to "the set-off" as known in former practice is necessary. By the common law, the setting off of one demand against another in the same action was unknown. If A had a cause of action in debt against B, and B had another cause of action in debt in

¹ Code Ref. 168, 169.

* **NOTE.**— Another group of States include, after the word "counter-claim," the words "or set-off," and also the clause, "A set-off can only be pleaded in actions on contract, and must be a cause of action arising upon contract or ascertained by a decision of the court." Code Ref. 170, 176. The Indiana code defines a counter-claim to be "any matter arising out of or connected with the subject of the action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's demand for damages." Several State codes provide for the bringing in of new parties, if they are necessary to a final decision of the counter-claim. Code Ref. 172.

equal amount against A, each must bring his action. One could not be set off against the other. This was changed by statute in England in 1729, by a provision* which, somewhat enlarged and modified, has been generally adopted in this country.

196. Recoupment of Damages.—We must also note the former practice as to what is called *recoupment of damages*. By the common law, another species of cross-demand could be pleaded specially and made available defensively to reduce or overcome the plaintiff's claim. It may be illustrated by an example. Thus, A sells a horse or other chattel to B, on credit, and in his contract of sale warrants the horse to be sound; and when the demand for the purchase price is due, he sues to recover it. Now, B has a cause of action against A, we will suppose, because the horse proves to be not sound; and when sued for the price, he pleads the breach of the warranty, and the damages sustained by him by reason of the

* NOTE.—The set-off had its rise in the statute of 2 Geo. II. c. 22, § 13, made perpetual by 8 Geo. II. c. 24, § 4, by which first-cited act it was provided "that where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator where there are mutual debts between the testator or intestate and either party, one debt may be set off against the other; and such matters may be given in evidence upon the general issue or pleaded in bar, as the nature of the case shall require, so as at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence under the general issue."

The American statutes have generally extended "the set-off" so that it includes not merely "mutual debts," as understood at common law, but demands for damages on contracts, suable at law either in covenant or assumpsit. Prior to the codes, the set-off was very important; and in the States which have not adopted the code the law of set-off is still in use and frequent application.

breach, in recoupment of A's claim for damages for the purchase price. He cuts back — to use the literal meaning of recoupment. He shows that, by reason of the breach of warranty, the horse was worth \$100 or some other sum less than he would have been worth had he been as good as warranted. Thus he may "cut back" against plaintiff's demand for damages, and reduce it by the amount established as his claim for damages. In some respects the set-off and the recoupment resembled each other. In others they were dissimilar. They were similar in these points : —

1. They must each arise out of contract.
2. They were both confined to actions on contract.

They were dissimilar in these respects : —

1. The set-off arose out of statute; the doctrine of recoupment was of judicial origin.
2. Set-off must be of a sum liquidated and certain; recoupment was for unliquidated damages.
3. A set-off must arise out of some other contract than the one sued on; the claim for recoupment could arise only out of the same contract.
4. The defendant pleading a set-off could recover the excess of his claim over that of the plaintiff. The two claims were set off, and the one in whose favor a balance was found obtained judgment for such balance. But in recoupment the defendant's claim, though it might exceed the plaintiff's, could be used only defensively. He could "cut back" on plaintiff's claim for damages to the full extent of the plaintiff's claim, but he could not recover the balance of his claim, even though it were greater than the claim of the plaintiff in the action.*

* NOTE. — A few examples will illustrate the doctrine of recoupment. The plaintiff sues to recover the purchase price of land. The defendant recoups damages resulting to him by reason of false and

199. Equitable Set-off. — Before the statute of set-off, the Court of Chancery had borrowed from the civil law the doctrine of compensation, or principle of natural equity, that a man should not be compelled to pay one moment what he will be entitled to recover back the next. The common law refused to recognize this principle. But by the statute of 4, 5 Anne, c. 17, mutual debts and credits could be set off in bankruptcy, and by the statutes of 2 Geo. II. c. 22 (here quoted in note) and 8 Geo. II. c. 24, set-off was applied in the law courts of mutual debts.¹ After the legal set-off had been established, equity followed the law in many particulars. The principal distinctions between the set-off of the law courts and those of equity courts were these: (1) The courts of equity, which at first assumed jurisdiction in case of set-off on the natural equity of compensation, after the passage of the statutes allowing legal set-off, exercised the power of set-off only when a legal demand was interposed in an equitable suit; (2) When an equitable demand could not be enforced at law, and the other party sued there; (3) Where the demands were both legal, and the party seeking the benefit of the set-off could show some equitable ground for being protected.²

The counter-claim of the codes includes within its terms

¹ *Ante*, p. 251.

² Story's Eq. Jur. §§ 1430-1444; Willard's Eq. Jur. Potter's ed. p. 995, c. 13; *Tribble v. Taul*, 7 Mon. (Ky.) 455; *Graham v. Telford*, 1 Metc. (Ky.) 112.

fraudulent representations. *Van Epps v. Harrison*, 5 Hill, 63. In action for goods sold, damages for breach of plaintiff's warranty of the goods can be recouped. *Reab v. McAlister*, 8 Wend. 109. In action for rent, breach of covenant for quiet enjoyment may be pleaded in recoupment. *Whitbeck v. Skinner*, 7 Hill, 53. In action on promissory note given for services in making a water-wheel, defendant can recoup damages resulting from unskillful work. *Butler v. Titus*, 13 Wis. 429.

the equitable as well as the legal set-off;¹ but in exception to this general statement it is to be noted that when one partner sues another as at law, he cannot counter-claim any cause of action arising out of the unsettled partnership accounts.²

200. The Counter-claim includes what? —The counter-claim of the codes we shall find by analysis of the words of the statutes to include —

1. The set-off of the former system, for it provides that in "an action arising out of contract, any other cause of action arising out of contract" may be counter-claimed.

2. More than the set-off of mere "mutual debts." *Unliquidated* demands for breach of other contracts than the one sued on may be the grounds of a counter-claim.

3. The recoupment of the common law. The codes allow the defendant to plead as a counter-claim a cause of action "arising out of the contract . . . set forth as the foundation of the plaintiff's claim." This embraces all phases of the recoupment.

4. Being more comprehensive than set-off and recoupment together, it extends to causes of action for damages "arising out of the same . . . transaction set forth in the complaint as the foundation of the plaintiff's claim." The word "transaction" is here used to mean more than "contract." Out of the "same transaction" a cause of action, from one point of view, may arise in plaintiff's favor, on contract; another may arise *ex delicto*, or for tort, in defendant's favor. Since they arise out of the "same transaction,"—that is, "that combination of events, acts and circumstances and defaults, which, viewed

¹ *Gage v. Angell*, 8 How. Pr. 335.

² *Sprout v. Crowley*, 30 Wis. 187; *Linderman v. Disbrow*, 31 Wis. 465; *Ives v. Miller*, 19 Barb. 196; *Iliff v. Brazill*, 27 Ia. 131; *Haskell v. Moore*, 29 Cal. 437.

in one aspect, results in the plaintiff's right of action, and viewed in another aspect results in the defendant's right of action,"¹—it is in the interest of justice that they should be adjudicated in one trial.

5. Causes of action "connected with the subject of the plaintiff's action."

6. In equitable actions, the counter-claim may include (a) any of the preceding, or it may be (b) some matter entitling the defendant to affirmative equitable relief, or (c) to affirmative legal relief, or (d) both combined.

Of each of these there will be fuller explanation as we proceed.

201. The Essential Elements of a Counter-claim are:

1. *It must be a cause of action.*² The statement of it in the answer must be such that it would be a good complaint, and as such entitle the defendant to a judgment were he the plaintiff and the counter-claim his complaint.³

2. *It must exist in favor of the defendant who pleads it.* It may exist in favor of one, part, or all of the defendants, and must be pleaded severally if by one, or jointly by the part or all in whose favor jointly it exists. A, when sued by X, cannot set up a counter-claim in favor of B. To this, however, is to be noted the exception that in Indiana⁴ and Iowa⁵ a surety, when sued, may plead *defensively* a counter-claim existing in favor of his principal against the plaintiff. And a counter-claim existing in favor of an insolvent principal against the obligee may be set up by the surety, not as a counter-claim, but as

¹ Pom. Rem. § 774.

² *Matteson v. Ellsworth*, 28 Wis. 254; *Resch v. Senn*, 31 Wis. 138.

³ *Wright v. Batcheller*, 16 Kan. 259; *Garrett v. Love*, 89 N. C. 205; *Allen v. Douglass*, 29 Kan. 412; *Holgate v. Broome*, 8 Minn. 243.

⁴ R. S. An. Ed. 1888, § 349.

⁵ *McClain's An. Sta.* § 3867.

an *equitable* defence, when sued by the obligee,¹ in cases where equity would relieve the surety from the liability; but the general rule is, that even a surety cannot set up as a *counter-claim* a valid claim existing in favor of his principal.² He must have an equity growing out of the insolvency of the principal to give him the benefit of such counter-claim, even defensively.³ The counter-claim, if established in favor of a principal, is, of course, available as a defence to the surety.⁴

3. *The counter-claim must exist against the plaintiff*, so that a judgment may be rendered against him. The New York code authorizes counter-claim against the one whom the plaintiff represents, to be pleaded in a proper case.⁵ Where there are several defendants or several plaintiffs, the counter-claim must exist in favor of a defendant and against a plaintiff between whom a several judgment may be had. Of this, more will be said later on.⁶

4. *It must, in actions on contract, where counter-claims arising on another contract is pleaded, exist at the commencement of the action.* The counter-claim must be due or be an accrued right of action at the time the plaintiff's action is brought, and must at that time exist against the plaintiff, and in the defendant's favor. It follows, then, that such claims as the following cannot be pleaded as counter-claims:—

(a) A claim that is not mature at the time the plaintiff's action is commenced. If it mature or accrue afterward, it is not pleadable as a counter-claim,⁷ except in Iowa.⁸

¹ Pom. Rem. § 750.

² O'Brien v. Karing, 57 N. Y. 649; Springer v. Dwyer, 50 N. Y. 19.

³ Gillespie v. Torrance, 25 N. Y. 306.

⁴ Pom. Rem. § 750.

⁵ N. Y. Code Pro. § 501.

⁶ Post, p. 256.

⁷ Taylor v. Mayor, etc., 82 N. Y. 10, and cases cited; Orton v. Noonan, 29 Wis. 541.

⁸ McClain's Ann. Sts. § 3865.

(b) A claim which is transferred or assigned to the defendant, by a third person, after the action has been commenced. It is not permissible for one who is sued to hunt up and buy in an outstanding claim against the plaintiff, to plead it as a counter-claim.¹

(c) A claim which may be mature as against some third person when the action is brought, but not mature as against the plaintiff; as, for example, where the plaintiff was contingently liable as guarantor or surety to some debtor of the defendant; but his liability as such did not become absolute until after the plaintiff's action was begun.

(d) A cause of action which the defendant had against the plaintiff, but had assigned away and disposed of his interest in, before the plaintiff's action was begun.²

5. *It must tend to diminish, defeat, or otherwise affect the plaintiff's recovery.* In actions to recover damages in money, any counter-claim by which the defendant seeks also to recover money damages against the plaintiff must necessarily operate to reduce and offset the plaintiff's recovery. And there are many actions of an equitable nature, where other relief than money damages is sought, in which the counter-claim operates to lessen, or to some extent modify the relief sought by the plaintiff. Such counter-claims are permitted to be pleaded. But the courts all hold, and some of the codes declare,³ that the counter-claim must be such as to lessen, defeat, or interfere with the relief otherwise recoverable by the plaintiff.⁴ It must in some way afford protection to the defendant

¹ Rickard v. Kohl, 22 Wis. 506; Todd v. Crutsinger, 30 Mo. App. 145.

² Belknap v. McIntyre, 2 Abb. Pr. 366; but see Robinson v. Howes, 20 N. Y. 84.

³ N. Y. Code Proc. § 501; Indiana, § 350; Oklahoma, § 4382.

⁴ Dietrich v. Koch, 35 Wis. 618.

against the plaintiff's demand for judgment.¹ If the relief which the defendant seeks would not in any way affect or change the relief which the plaintiff sought to recover, he cannot put it forward as a counter-claim, but must seek his remedy in an independent action.

6. *The counter-claim must exist against a plaintiff and in favor of a defendant.*² Hence it is apparent that (1) If A sue B on a cause of action in A's favor alone, B cannot set up a counter-claim in his favor against A and C jointly.³ (2) If A and B jointly sue C on their joint claim, C cannot set up a counter-claim in his favor against A alone or B alone.⁴ (3) If A sue C on a claim in A's favor alone, C cannot counter-claim a cause of action existing jointly in favor of B and C.⁵ (4) If A sue B and C on a claim against them jointly, neither can set up his individual counter-claim.⁶*

7. *The counter-claim may be in favor of one or more of several defendants, and against one or more of several plaintiffs,* between whom a several judgment might have been had.⁷ The rules established by the numerous decisions on this code provision may be summed up thus:—

¹ *Heckman v. Schwartz*, 55 Wis. 173; *Weatherby v. Meicklejohn*, 56 Wis. 73; *Mattoon v. Baker*, 24 How. Pr. 329; *Waddell v. Darling*, 51 N. Y. 327.

² Code Ref. 168.

³ *Ives v. Miller*, 19 Barb. 196; *Mynderse v. Snook*, 1 Lans. 488; *Lawrence v. Vilas*, 20 Wis. 390.

⁴ *Goodwin v. Conklin*, 6 N. Y. Week. Dig. 131; *Weil v. Jones*, 70 Mo. 560.

⁵ *Baldwin v. Berrian*, 53 How. Pr. 81; *Hopkins v. Lane*, 87 N. Y. 501.

⁶ *Bockover v. Harris*, 11 Jones & Sp. 548; *Bank v. Boylan*, 2 Abb. N. C. 216.

⁷ Code Ref. 168.

* **NOTE.**—But it must be borne in mind that in a few code States the lacking parties may be brought in so as to give the counter-claim effect (Code Ref. 172), thus making the counter-claim more closely a substitute for the cross-bill in equity.

(1) When the plaintiffs have a *joint* right of action, a counter-claim cannot be pleaded against one or part of them. (2) When their claims are distinct and several, but they are permitted to join in the action, then counter-claims against them severally may be set up. (3) If two or more plaintiffs, suing together, are *improperly joined*, or the claim exists in favor of part of them only, a counter-claim against the real parties in interest may be pleaded. (4) When the defendants are jointly liable, one or part cannot set up severally their counter-claims. (5) When sued jointly, though severally liable, they may severally set up their counter-claims. (6) When jointly and severally liable, though sued jointly, they may set up severally their counter-claims, or part of them may so counter-claim. (7) In *equitable* actions, if the plaintiffs have different interests and seek different reliefs, counter-claims against one or part thus distinct in interest may be pleaded. (8) In equitable actions, where different liabilities are set up against different defendants, and different reliefs sought against them, counter-claims in favor of defendants may be pleaded, according to the relief prayed against them.

202. The Nature of the Causes of Action that may be used as Counter-claims.— We must now consider with some particularity the nature of the causes of action which may be pleaded as counter-claims. From what has already been explained, it will be seen that they embrace —

1. Causes of action arising out of the contract set forth as the foundation of the plaintiff's claim.

2. Causes of action arising out of the "same transaction" (not necessarily the contract) which is the foundation of the plaintiff's claim.

3. Causes of action arising out of transactions connected with the subject of the action.

4. In actions arising out of contract any other cause of action arising also on contract express or implied.

5. In some States, the right of the surety, sued upon his obligation as surety, to plead a counter-claim existing in favor of his principal, as an equitable defence to his own liability.

6. In Wisconsin any cause of action whatever, arising within the State and existing at the commencement of the action, may be pleaded as a counter-claim against a non-resident plaintiff.¹ To consider these in their order, —

1. *Causes of Action arising out of the Contract set forth as the Foundation of the Plaintiff's Claim.* —

Out of the same contract one cause of action may exist in plaintiff's favor for some violation of its terms by the defendant. There may also arise a cause of action in defendant's favor for some breach by the plaintiff of the same contract. The instances where this may happen are infinite. It may happen also that the plaintiff conceives that he has a cause of action for the defendant's breach of the contract, when he has no cause and there is no breach; and he at the same time may be liable for his own breach. The counter-claims permitted by this clause, in the most general classification, embrace — (a) all the cases where recoupment was permissible under the former practice; (b) all cases in which by the practice in equity courts the defendant might, upon the same contract, maintain a suit to obtain some affirmative relief, such as rescission, cancellation, setting aside for fraud, reformation of mistake, specific performance, or any other appropriate affirmative relief.² And this is true, whether the action against the defendant is such as would be deemed legal or equitable under the former system. For the almost numberless instances given in the books, the student is referred to text-books which treat the subject with exhaustive reference

¹ R. S. Wis. § 2656.

² Gallup v. Bernd, 132 N. Y. 370.

to all the cases, and to the annotated statutes or codes now to be found in nearly all the code States; (c) a judgment is a contract, and when obtained, even though in an action of tort, it may be counter-claimed in an action upon contract.¹

2. *Causes of Action arising out of the Transaction set forth as the Foundation of the Plaintiff's Claim.* — Some difficulty has been experienced by the courts in exactly construing this statute, growing out of the fact that the word "transaction" is of such general import and has no fixed and strict legal definition.*

From the decisions under this clause it may be gathered that a counter-claim may be pleaded — (a) in an action on contract, for the plaintiff's tort, committed in "the same transaction;"² (b) in an action in tort, for a liability arising upon a contract which is part of the transaction out of which plaintiff's cause of action arises.³ This class of cases arises most frequently where the plaintiff, upon the

¹ Taylor v. Root, 4 Keyes, 335.

² Ainsworth v. Bowen, 9 Wis. 348; Vilas v. Mason, 25 Wis. 310.

³ Judah v. Trustees, etc., 16 Ind. 56, 60; Bitting v. Thaxton, 72 N. C. 541; Griffin v. Moore, 52 Ind. 295.

* NOTE. — Some courts hold that "the word is used in application to some commercial or business negotiation, not to a wrong caused by an act of violence or fraud." *Barhyte v. Hughes*, 33 Barb. 320. Another, that is, "whatever may be done by one person which affects another's rights, and out of which a cause of action may arise" (*Scarborough v. Smith*, 18 Kan. 406); another, "to hold where B has tortiously carried away A's property, and the latter has at the same time committed a wrong against B, or obligated himself in some way to pay B a sum of money, that that arises out of the same transaction, constituting the foundation of A's claim for the trespass, would be extending the office of a counter-claim beyond the bounds of legislative enactment" (*Loewenberg v. Rosenthal*, 18 Ore. 184). "A transaction *eo nomine* involves the operation of two minds at least." *Rothschild v. Whitman*, 57 Hun, 138.

facts of his case, has an election whether to sue in contract or tort, and he sues in tort.¹

It is also clearly settled that — (a) a tort cannot be counter-claimed in an action of tort when the two wrongs are distinct and disconnected,² even though one may be consequent of the other;³ (b) in an action for tort, a counter-claim arising out of a contract cannot be counter-claimed, unless it arises out of the same transaction;⁴ (c) in an action on contract a counter-claim arising out of a tort cannot be counter-claimed, unless it arises out of the same transaction. But while this is true as to torts pleaded as counter-claims *as torts*, it is held that a defendant sued on contract may waive a tort and counter-claim on the implied contract; and that in all cases where he could sue on the implied contract, he may use it as a counter-claim in an action on contract.⁵

3. *Counter-claims "arising out of Transactions connected with the Subject of the Action."* — It is not yet fully settled what causes of action may, and what may not, be counter-claimed under this provision. It is intended to meet a class of cases which do not arise out of the same contract sued on, nor out of a different one, nor out of the "same transaction." These cases are mainly equitable actions, though the rule may apply in legal actions. What is meant by the term "subject of the action"? Clearly, the "subject of the action" means the plaintiff's principal primary right, the invasion of which gives the "cause of action," "the object of the action" being the legal remedy.

¹ Pom. Rem. § 788.

² Id. § 790.

³ *Shelley v. Vandersoll*, 23 Ind. 543. In opposition to the doctrine of the text are a few exceptional cases. See *McArthur v. Canal Co.* 34 Wis. 139, 146; 96 Wis. 473; 2 Metc. (Ky.) 339; 5 Kan. 146.

⁴ *People v. Dennison*, 84 N. Y. 272; *Bruce v. Burr*, 67 id. 237.

⁵ *Norden v. Jones*, 33 Wis. 600; *Brown v. Tuttle*, 66 Barb. 169; *City Nat. Bank v. Nat. Park Bank*, 32 Hun, 111; *Brady v. Brennan*, 25 Minn. 210; *Bryce v. Parker*, 11 S. C. 337.

This right of the plaintiff may be respecting lands or chattels, etc.; and when the defendant's cause of action arises out of transactions so connected with the plaintiff's alleged rights in the property that it is just and equitable that both causes be adjusted in one litigation,¹ the statute authorizes it.² The authorities agree that the connection must be immediate and direct, not remote, uncertain, and partial,³ and must be such that the parties could be supposed to have foreseen and contemplated it in their mutual acts.⁴

4. *In Actions arising on Contract any other Cause of Action arising also on Contract, express or implied.*

—This provision embraces the set-off of the former system. It is, however, much broader in its scope than the "set-off," for it admits demands for unliquidated damages, as well as debts or demands fixed or ascertained. It is also broader in its operation than the equitable set-off. The contract out of which the counter-claim arises need not be one made originally with the defendant. It may be a contract which has been assigned to him; but the assignment must have been complete before the commencement of the action. Under this clause of the codes may be counter-claimed in an action on contract—(1) any cause of action arising on another contract, whether legal or equitable, whether for damages liquidated or unliquidated; (2) any "equitable set-off," or demand for affirmative relief, as allowed in courts of Chancery; (3) some claims not formerly recognized as "equitable set-offs;"⁵ such

¹ On this topic space compels reference to Boone on Code Pl. §§ 87-98; Bliss on Code Pl. §§ 374-375; Bliss's Ann. N. Y. Code, § 501, note, p. 540, 3d ed.; Pom. Rem. § 794 and note, where the cases are fully collated.

² *Carpenter v. Ins. Co.* 93 N. Y. 552.

³ Pom. Rem. § 794.

⁴ *Connor v. Winter*, 7 Ind. 523.

⁵ As to equitable set-off, its nature and limitations, see *Graham v. Telford*, 1 Metc. (Ky.) 112; *ante*, p. 253.

causes of action given by statute as are recoverable in an action analogous to debt.¹ An example of these is found in the statutes giving an action for money lost by wager or in gambling against the winner or stake-holder. The action is usually in "debt" or for money had and received, and is in nature *ex contractu*.²

As the codes require that the cause of action arising out of another contract and pleaded as a counter-claim be one existing at the commencement of the action, the answer must allege that it existed at the commencement of the action, in the defendant's favor, or show that it so existed.³

5. *Special grounds of counter-claim* in some States. Here we need mention only the special grounds of counter-claim allowed in some States. In some States the counter-claim may be against the estate when the executor or administrator sues.⁴ In Iowa, a counter-claim maturing after suit begun may be pleaded.⁵

6. In Wisconsin, where the action is by a non-resident, any cause of action arising in the State and existing at the commencement of the action may be pleaded.⁶ In many of the code States the defendant in actions analogous to ejectment is allowed to counter-claim the value of his improvements made in good faith while holding possession and claiming under color of title, against the rents and profits, after judgment in ejectment goes against him.⁷

203. The Counter-claim, how pleaded.— The counter-claim must be pleaded as a counter-claim. There should

¹ McDougal v. Walling, 48 Barb. 364.

² Id.

³ Rice v. O'Conner, 10 Abb. Pr. 362; Van Valen v. Lapham, 5 Duer, 689; Richard v. Kohl, 22 Wis. 506; Gannon v. Dougherty, 41 Cal. 661.

⁴ Code Ref. 185.

⁵ Iowa An. Sta. § 3865.

⁶ R. S. Wis. § 2656.

⁷ N. Y. Code Pro. § 1531; Wis. R. S. § 3097; Ia. § 4492; Kan. § 4704; Okla. § 4994; Mont. § 369; Cal. § 741.

be no chance for mistake of the pleader's intent to make a counter-claim. It should in all cases be denominated a counter-claim, as some codes expressly require,¹ and the appropriate relief should be prayed.² The introductory words may be, "And, for a counter-claim to the said cause of action alleged in the complaint, the defendant alleges," etc. Where more than one counter-claim is pleaded, the rules as to separate statement and numbering apply, as in the complaint.

204. Several Counter-claims may be pleaded,³ and may be combined with denials or other defences,⁴ as the counter-claim does not operate as a confession of the plaintiff's claim, but admits only that he makes a claim.⁵ They should be separately stated, in all cases, and numbered by counts or paragraphs to comply with the local requirements.⁶

205. Discontinuance of action after counter-claim will not be permitted by the court, where the defendant wishes to have trial upon his counter-claim;⁷ and after utterly defeating the plaintiff's cause of action, defendant may push his counter-claim to judgment for all the relief it entitles him to.

206. The defendant is not bound to interpose his counter-claim, but may reserve it as the ground of an in-

¹ Code Ref. 187; Eq., etc. Soc. v. Cuyler, 75 N. Y. 511; 39 Wis. 614.

² Van Valen v. Lapham, 5 Duer, 689; Clough v. Murray, 19 Abb. Pr. 97; Sullivan v. Byrne, 10 S. C. 122; Selleck v. Griswold, 49 Wis. 39; Bank v. Carr, 49 Ia. 359; Resch v. Senn, 31 Wis. 138.

³ Code Ref. 159.

⁴ Id. 188.

⁵ Pom. Rem. § 739.

⁶ Code Ref. 188.

⁷ Gwathmey v. Cheatham, 21 Hun, 576; Geenia v. Keab, 66 Barb. 245; Davis v. Loulmin, 77 N. Y. 280; Francis v. Edwards, 77 N. C. 271; Code Ref. 181; Bliss's Ann. Co. p. 3187.

dependent action, unless the codes require it to be pleaded.¹ Several States require the counter-claim to be pleaded or it will be barred,² unless withdrawn by permission or order of the court.³ A few States deny costs in the subsequent action on a counter-claim not pleaded when it might have been,⁴ unless withdrawn on leave, or stricken out.

207. When Cross-Demands deemed compensated. — In several of the code States this provision is found, originally appearing in the Ohio code: "When cross-demands have existed between persons, under such circumstances that if one had brought an action against the other, a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment by the other or by his death, but the two demands must be deemed compensated, so far as they equal each other."⁵ This section seems to be inserted for greater certainty. It does not materially change the general principles of the code as originally enacted in New York and copied in the other States by which a code has been adopted.

SECTION VI.

WHEN AN ISSUE OF FACT ARISES.

208. An Issue of Fact defined. — The codes define an issue of fact to be one that arises — (1) upon a material fact in the complaint controverted by the answer; or (2) upon a material allegation of new matter in the answer, controverted by the reply; or (3) upon a material allegation of new matter in the answer, not requiring a reply, unless

¹ *Welch v. Hazelton*, 14 How. Pr. 97; *Morgan v. Powers*, 66 Barb. 35; *Francis v. Edwards*, 77 N. C. 275.

² Code Ref. 177.

⁴ *Id.* 179.

³ *Id.* 178.

⁵ *Id.* 180.

an issue of law is joined thereon; or (4) upon a material allegation of new matter in the reply, unless an issue of law is joined thereon.

Such is the general provision of the codes. In those States which admit no reply in the series, all new matter in the answer is deemed controverted.

209. What Matter deemed admitted in Pleadings.—

The most of the codes further provide that the following allegations of the complaint shall be taken as true, viz.:

(1) every material allegation of the complaint not controverted by the answer; (2) every material allegation in a counter-claim not controverted by the reply.

But the allegation of new matter in the reply is to be deemed controverted by the adverse party, as upon a direct denial or avoidance as the case may require.¹

In those States which permit no reply in the series of pleadings, all new matter in the answer, whether counter-claim or defensive merely, is deemed controverted.² And in the States which require new defensive matter in the answer to be replied to, the omission to reply amounts to an admission.^{3*}

¹ Code Ref. 255.

² Id. 256.

³ Id. 256.

* **NOTE.**—Among the cases illustrating and applying this statute are the following: The allegations deemed admitted by failure to deny them are only such as are material. *Fry v. Bennett*, 5 Sandf. 54; *Mayor, etc., v. Cunliff*, 2 N. Y. 165; *Anable v. Conklin*, 25 N. Y. 470; *Fleischmann v. Stern*, 90 N. Y. 110. See, also, *Landers v. Bolton*, 26 Cal. 416; *Whitwell v. Thomas*, 9 Cal. 499; *Jones v. Petaluma*, 36 Cal. 230; *Frasier v. Williams*, 15 Minn. 288; *Bartholow v. Campbell*, 56 Mo. 117; *Breckinridge v. Ins. Co.* 87 Mo. 62; *Pike v. Martindale*, 91 Mo. 268; *Van Akin v. Welch*, 80 Ia. 114. As to allegations deemed controverted without denial, see *Nat. Bank v. Wright*, 48 N. W. (Ia.) 91; 50 N. W. 91; *Bliss's Ann. Co.* pp. 574-579.

CHAPTER IX.

DEMURRER TO ANSWER.

210. Demurrer to Answer.—The plaintiff may demur to the answer when it appears on the face thereof that it does not state facts sufficient to constitute a defence. In some of the codes this is demurring for “insufficiency.”¹ In such cases the ordinary rules of pleading apply, and the answer is tested by them. This form of demurrer in some of the States reaches also to the counter-claim.² In others it is specially provided that the demurrer to the counter-claim shall be upon and specify one or more of the following grounds, apparent on the face of the answer, viz. : (1) for insufficiency of facts ; (2) for lack of jurisdiction ; (3) for lack of legal capacity in the defendant to maintain the action ; (4) for pendency of another action between the same parties for the same cause ; (5) defect of parties ; (6) that the cause of action is not pleadable as a counter-claim.³ To these a few jurisdictions (California, Montana, and Utah) add the further grounds, (1) that counter-claims are improperly united, and (2) that the answers are ambiguous, unintelligible, and uncertain.⁴

Most of the rules applicable to demurrers to complaints necessarily apply to demurrers to counter-claims, and need not be here repeated.⁵ In some States it is provided that all objections, except lack of jurisdiction and sufficiency, are waived unless taken by demurrer.⁶

¹ Code Ref. 189, 190.

² Id. 195.

³ *Ante*, p. 212.

⁴ Id. 190-195.

⁵ Id. 196.

⁶ Code Ref. 200.

211. The Demurrer may be to the whole Answer or any Defence or Counter-claim; and the plaintiff may demur to one or more and answer others.¹

212. The Form of Demurrer to Answer.—In drawing the demurrer, the following points must be observed:—

1. State that the grounds thereof appear upon the face of the answer.

2. State the grounds distinctly, as the local code may require.

3. In demurring to one or part of the defences or counter-claims, take care to fully indicate which one is demurred to.

4. When one or part of the defendants answer separately, let the demurrer show whose answer is demurred to.

The demurrer will usually be sufficient if in the following or some substantially equivalent form: *—

FORM OF DEMURRER.

Title of Cause. } Demurrer to Counter-claim.

The plaintiff, by —, his attorney, demurs to the (first) counter-claim set forth in the answer of the defendant [*name him*] herein, and states, as grounds of demurrer, that it appears upon the face of said answer that the court has no jurisdiction thereof (*or*, that the said defendant has not legal capacity to maintain

¹ Code Ref. 198.

* **NOTE.**—As to form of demurrer, consult *Safford v. Snedecker*, 67 How. Pr. 264; *Howell v. Stewart*, 54 Mo. 400; *Campbell v. Jones*, 25 Minn. 155; *Howland v. Kenosha*, 19 Wis. 247; *Ormsby v. R. R. Co.* 1 Col. S. Rep. 117; *Foster v. Daily*, 3 Ind. Appeal, 530; *Conley v. R. R. Co.* 109 N. C. 692; *Angaletos v. Meridian Nat. Bank* (Ind. App.) 31 N. E. 368; *Grimshaw v. Woodfall*, 40 N. Y. S. R. 299; *Glass v. Murphy* (4 Ind. App. 530), 30 N. E. 1097; *Wilhoit v. Cunningham*, 87 Cal. 453.

the same) in this, to wit: [*here specify wherein want of capacity appears on the face*], or, that there is a defect of parties in this, to wit: [*here specify wherein the defect of parties is shown*] (or, that the said counter-claim does not state facts sufficient to constitute a cause of action), (or, that the cause of action stated is not pleadable as a counter-claim), or, in the States of California, Montana, and Utah, that said answer (or counter-claim) is ambiguous or unintelligible (or uncertain).¹

(Signature) _____

Pl'ff's Attorney.

213. Demurrer to Answer confined to New Matter therein.—By the New York code the demurrer can be made only to new matter in the answer.² An answer containing merely denial is not demurrable, though the denials may be so incomplete and insufficient as not to form an issue. The proper way to take advantage of such an objection is (a) to move to strike it out; or (b) to move for judgment on the pleadings; or (c) to move to make it more definite and certain where vagueness and uncertainty are its only faults.³ Where the codes provide for a demurrer on the ground that the answer “does not state facts sufficient to constitute a defence or counter-claim,” defective or informal denial is not ground for demurrer. The defect in such case is of form, and the special demurrer for formal defects is abrogated. The remedy is sought by motion.⁴ In some of the States the language of the code is that the plaintiff may “demur to the answer for insufficiency.” Under such a statute an

¹ Code Ref. 197. The demurrer under this California statute must specify one ground, not all. A demurrer on the ground that the answer is ambiguous, unintelligible, and uncertain is not good. *Wilhoit v. Cunningham*, 87 Cal. 453; *Owen v. Oviatt*, 4 Utah, 95.

² N. Y. Code Proc. § 494.

³ *Bliss's Ann. Code*, 3d ed. vol. i. p. 489.

⁴ *Pom. Rem.* § 596; *Lewis v. Coulter*, 10 Ohio St. 451; *Flanders v. McVicker*, 7 Wis. 372; *Spence v. Spence*, 17 Wis. 448.

insufficient denial would, according to common-law doctrine, be deemed ground for demurrer;¹ but the better course under the code is to move for judgment on the ground that the facts alleged in the complaint stand admitted; or, if the denial be in doubtful or uncertain terms, to move to make more definite and certain. In New York demurrer does not lie for defective denial.*

¹ N. Y. Code Pro. § 494; *Smith v. Greening*, 2 Sandf. 702.

* NOTE.—Demurrer to “each and every defence contained in the answer is of the same effect as if made separately to each defence.” *Konnah v. McGolgan*, 21 N. Y. State Rep. 326; *Drake v. Satterlee*, 41 N. Y. 576. Demurrer will not lie to part of a defence in an answer. *Cobb v. Frazee*, 4 How. Pr. 413. Where an answer alleges two defences, one of which is good, a general demurrer will be overruled. It should be to the defences separately. Demurrer to the answer “reaches back to the first fault.” *Ante*, p. 225; *People v. Booth*, 32 N. Y. 397, and the sufficiency of the complaint may be considered under it.

In Wisconsin, an answer which contains only a general denial admits of no demurrer or reply. *Whitefoot v. Leffingwell*, 90 Wis. 182. An answer squarely meeting the allegations of the complaint is sufficient as a denial, though it states new matter not sufficient to constitute a legal defence. *Cleveland v. Burnham*, 55 id. 598. The answer is not demurrable if it state matter constituting a defence, though it erroneously name it a “defence and counter-claim,” 78 id. 228. Where the new matter alleged does not constitute a defence or counter-claim, the plaintiff may upon the trial object to introduction of testimony to support it, and ask for direction of verdict in his favor. *Matthiesen v. Schomberg*, 94 Wis. 1.

In Indiana, a demurrer to an answer on the ground that it does not state facts sufficient to constitute “a cause of action” is bad, as it should be “a defence.” *Hawley v. Zigleri*, 34 N. E. 364. It is bad if it deny the sufficiency “in law,” as both legal and equitable defences are allowed. *Funk v. Reuchler*, 33 N. E. 898, 364.

On demurrer to an answer, its sufficiency must be tested by the facts set forth, and it cannot be helped by extrinsic facts. *Beers v. Dalles City*, 16 Ore. 334; 18 Pac. 835.

CHAPTER X.

THE REPLY.

214. Reply, when Necessary. — 1. In all the code jurisdictions (except California, Nevada, Idaho, and Utah, in which States the reply is not embraced in the series of pleadings) a reply on the part of the plaintiff is necessary when the answer sets up a counter-claim, properly pleaded.¹

2. In the States of Connecticut, Indiana, Iowa, Minnesota, Missouri, Montana, Nebraska, Ohio, Washington, Wyoming, and in Oklahoma, the plaintiff must reply not only to a counter-claim, but also to any new matter in the answer constituting a defence properly pleaded.²

3. In the States of New York, North Carolina, North Dakota, and South Dakota, the court may in discretion, on the defendant's motion, order a reply to be filed and served, when the answer sets up new matter in avoidance.³

4. In Kentucky, although substantially a code State, the whole series of pleadings, as at common law, but in code form, are allowed for the production of an issue.⁴

5. As the reply is necessary only in certain cases, it should not be interposed unless required; but where a reply is improperly interposed and no objection is taken until after trial, the error will be deemed waived.⁵ So, if

¹ Code Ref. 203.

² Id. 208.

³ Id. 209.

⁴ Carroll's Ky. Code, §§ 98-100.

⁵ *Irvin v. Smith*, 60 Wis. 172.

a reply be interposed to a counter-claim which is not expressly denominated as such in the answer, it will be deemed a waiver of the objection that the counter-claim was not properly pleaded and designated as such.¹

215. The Object of the Reply.—(1) When the reply pleaded to a counter-claim is (a) either to deny generally or specifically the allegations of the answer constituting the counter-claim; or (b) to meet it by new matter constituting a defence,² the reply is then analogous to the plea at common law. (2) When the reply is required to be pleaded to defensive matter in the answer, its object is like that of the replication at common law, to meet the new matter in the answer by denial, general or specific, or by other new matter in avoidance.³ Unless replied to, the well-pleaded counter-claim stands as admitted⁴ in all the jurisdictions where a reply is required to be pleaded to a counter-claim.⁵

216. Departure in Reply not Allowable.—As at common law in the replication, so under the codes there must be no “departure” in pleading the plaintiff’s reply. Its statements must be consistent with the allegations of his complaint; he cannot abandon the ground there taken and state a new case against the defendant.⁶ As to the

¹ Washburn v. Dosch, 68 Wis. 431.

² Code Ref. 203.

³ Id. 208.

⁴ Code Ref. 255. See Carroll’s Ky. Code, § 101.

⁵ California, Nevada, Idaho, and Utah require no reply; and there all new matter in the answer, whether defensive or counter-claim, is deemed controverted, and can be met by evidence to contradict, or new matter by way of avoidance. Cal. Code Civ. Pro. § 422; Nev. Comp. Laws, § 1101; Idaho, § 228; Code Ref. 211; Doyle v. Franklin, 40 Cal. 106.

⁶ Code Ref. 203; Campbell v. Mellen, 61 Wis. 612; Beard v. Hand, 88 Ind. 183; Magruder v. Admire, 4 Mo. App. 470; Haas v. Shaw, 91 Ind. 384; Durbin v. Fisk, 16 O. St. 533; Hastings’ School Dist. v. Caldwell, 16 Neb. 68; Burdell v. Denig, 15 Fed. Rep. 397.

manner of taking the objection that a reply is obnoxious to the fault of departure, courts are not uniform. In Indiana, the fault is open to demurrer;¹ in Missouri, to motion to strike out.² While at common law departure is ground for general demurrer, the more proper course under the code would seem to be motion to strike out the matter set up as inconsistent with the complaint as irrelevant matter. If no objection is taken at the proper time, — that is, before trial, — the judgment will not be arrested for a departure.³ The rule at present is as it was at common law.⁴ But the reason for the rule is not the same: at common law the departure tended to postpone the issue; in code pleading it rather tends to confuse it.

217. Form of Reply. — The form of reply, of course, must vary with the facts to be met by denial or avoidance. The general introduction of a reply may be as follows:

REPLY TO COUNTER-CLAIM.

Title of Cause. } Reply.

The plaintiff by —, his attorney, for reply to the (first) counter-claim set forth in the answer of the defendant [*name him*] denies each and every allegation of said counter-claim.

And for a further (and second) defence to said counter-claim, the plaintiff alleges [*here set forth new matter available as a defence*].

218. The Essentials of a Reply are — (1) when it answers a counter-claim, that it meet the counter-claim with (a) a general or specific denial of some or all of its material allegations, or (b) with new matter that would constitute a good defence to such counter-claim, were it

¹ *Haas v. Shaw*, 91 Ind. 384.

² *Phillibert v. Burch*, 4 Mo. App. 470. See *White v. Joy*, 13 N. Y. 83.

³ *New v. Wambach*, 42 Ind. 456. ⁴ *Chitt. Pl.*, 16 Am. ed. p. 678

set forth in a complaint; (2) when it is pleaded as defensive matter, that it should be such as constitutes a good avoidance of the new matter in the answer; (3) that it be distinct and specific, so that it may be clearly perceived what is controverted, and to what defences or counter-claims the new matter is directed; (4) it cannot, as in the common-law system, set out by *new assignment* the indefinitely stated cause of action set forth in the complaint.¹ Nor can it help out the imperfect averments of a complaint or serve the purpose of an amended complaint.² That result must be accomplished, when necessary, by amendment of the complaint, or by supplemental complaint, as the case may require.³ (5) The reply may contain as many defences or avoidances of the counter-claims (or defences where defensive matter in the answer may be replied to) as the plaintiff may desire to plead; but they must be separately stated, and in some States numbered.⁴

219. Waiver of Reply.—Where a reply is required and is not made, but the parties upon the trial proceed upon the evidence, as if the facts to which reply should have been made were controverted, the want of a reply will be deemed waived.⁵

220. An unnecessary reply will be stricken out on motion of the defendant in those States where reply is allowed only to a counter-claim.⁶

¹ *Shull v. Green*, 34 How. Pr. 418; 49 Barb. 311; *Stewart v. Wallis*, 30 Barb. 344.

² *Bernheimer v. Marshall*, 2 Minn. 78; *Hatch v. Coddington*, 32 Minn. 92. ³ *Post*, pp. 278, 307. ⁴ Code Ref. 204.

⁵ *State v. Williams*, 77 Mo. 463; *Woodward v. Sloan*, 27 O. St. 592; *Nooner v. Short*, 20 Kan. 624; *Jordan v. Bank*, 74 N. Y. 467.

⁶ *Dillon v. R. R. Co.* 14 Jones & Sp. 21; *Devlin v. Bevins*, 22 How 290; *Gilbert v. Cram*, 12 How. Pr. 455.

221. Reply to an amended answer is not necessary where the original answer has been replied to, and the amended answer sets up no new issuable facts requiring a reply.¹ A reply to an answer will stand as the reply to an amended answer if so treated by the parties at the trial without objection.² Where the amended answer sets up new matter that ought to be met by reply, and it is not sufficiently met by first reply, a reply to the amended answer is necessary.

222. The Plaintiff cannot set up a Counter-claim to a Counter-claim, according to the New York Code³ and those which follow it.⁴ It is permitted in Indiana⁵ and Kentucky;⁶ but most of the codes allow the counter-claim to be only by reply containing new matter containing general or special denial, or new matter constituting a *defence*.⁷ But it seems that new matter amounting to a counter-claim may be pleaded in a reply as a *defence*.⁸ And when pleaded without objection it will be regarded as an amendment to the complaint,⁹ but it will be stricken out on motion.¹⁰

¹ *Leslie v. Leslie*, 11 Abb. N. S. 311.

² *Vaughan v. Howe*, 20 Wis. 497.

³ *Bliss' Ann. Code*, § 514; *Cohn v. Hussen*, 66 How. Pr. 150; *Hall v. Hall*, 30 How. Pr. 56. See 14 W. Dig. 574.

⁴ *Campbell v. Mellen*, 61 Wis. 612; *Dawson v. Dillon*, 26 Mo. 395.

⁵ *Peden v. Mail*, 118 Ind. 556.

⁶ *Carroll's Code*, § 99.

⁷ *Campbell v. Mellen*, 61 Wis. 612; *Hatfield v. Todd*, 13 Civ. Pro. R. 265.

⁸ *Mortland v. Holton*, 44 Mo. 58. In Missouri, defendants jointly sued may each plead a set-off in his favor severally. In such case the plaintiff may plead any set-off he may have to such several claim as a bar to the right to recover on the defendant's set-off. *Id.* *Townsend v. Minnesota, etc. Co.* 46 Minn. 121; 48 N. W. 682.

⁹ *Scott v. Bryan*, 96 N. C. 289.

¹⁰ *Cohn v. Hussen*, 66 How. Pr. 150; 13 Civ. Pro. 265; 14 W. Dig. 574.

CHAPTER XI.

THE DEMURRER TO THE REPLY.

223. The Defendant may demur to the Reply. — (1) When a counter-claim is set up in the answer, and the reply fails to state facts sufficient to constitute a defence.¹ (2) In those jurisdictions where the reply is made to defensive matter, as well as to counter-claims, the demurrer may also be on the ground that the reply is insufficient to avoid the new matter set up in the answer as a defence.²

224. Must specify Grounds. — In accordance with the general rule, the demurrer to the reply must specify the grounds.³ It will in general suffice to specify the insufficiency in the language of the statute.⁴

225. The form of demurrer to reply may, in most jurisdictions, be as follows: —

FORM OF DEMURRER TO REPLY.

Title of Cause. } Demurrer to Reply.

The defendant [*name him*] by —, his attorney, demurs to the reply of the plaintiff herein, and specifies as grounds of such demurrer that it appears upon the face of said reply that the same does not state facts sufficient to constitute a defence.

— —, *Pl'ff's Attorney.*

Under the New York code, § 493, the ground should be stated thus: —

“that it is insufficient in law, upon the face thereof, to constitute a reply.”

¹ Code Ref. 212.

² Id. 212.

³ Id. 212.

⁴ *Miller v. School T'wp*, 101 Ind. 503.

CHAPTER XII.

GENERAL PROVISIONS AS TO PLEADING.

SECTION I.

AMENDMENT OF PLEADINGS.

226. Amendment of Pleadings. — In all systems of pleadings there is much liberality in allowing amendment. At common law, under the statutes of jeofails and amendments, pleadings could be amended in the discretion of the court, even to change the form of the action.¹ In courts of equity amendments are freely allowed, both of course and by permission; but neither at law nor in equity is it permitted the plaintiff to change by amendment his pleading so as to set up an entirely new and different cause of action from that first stated.²

The codes allow great latitude in amendment. The only limitation seems to be that "the amendment shall not bring a new cause of action."³

227. The Code Provisions. — The codes very generally contain, with slight verbal variations, the following provisions for: —

¹ 1 Chitty's Pl. 16 Am. ed. 220; but see *Little v. Morgan*, 31 N. H. 499.

² *Milliken v. Whitehouse*, 49 Me. 527; *Cooper v. Waldron*, 50 Me. 80; *Sumner v. Brown*, 34 Vt. 194; *Waldron v. Bodley*, 14 Pet. 156; *Verplank v. Merc. Ins. Co.* 1 Edw. Ch. 46.

³ *Reeder v. Sayre*, 70 N. Y. 190; *Sup'rs v. Decker*, 30 Wis. 378; *Sweet v. Mitchell*, 15 Wis. 641; *Scovill v. Glassner*, 79 Mo. 449; *Humphrey v. Hughes*, 79 Ky. 487; *Stevens v. Brooks*, 23 Wis. 196.

1. *Amendments, of course, without leave of court.* — “Any pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had, at any time before the period for answering it expires,¹ or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading.”² Under these provisions the plaintiff may amend his complaint (a) after service and before an answer or demurrer is received, or (b) at any time within twenty days after the answer or demurrer has been served in the action. So the defendant may amend his answer (a) after service at any time until the time for serving demurrer or reply has expired, and (b) at any time within twenty days after the demurrer or reply has been served. In like manner the plaintiff may amend his reply (a) at any time within twenty days after service, and (b) at any time within twenty days after a demurrer thereto has been served. When the pleadings are served by mail, the time in which to answer is usually double the time limited where service is personal.³

2. *Amendments by leave of Court.* — “The court may, upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice, and upon such terms as may be just, amend any process, pleading, or proceeding, by adding or striking out the name of a party or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defence, by conforming the pleading to the facts proved.”⁴

This permits three classes of amendments: (1) those made on leave before trial; (2) those allowed at the trial;

¹ Code Ref. 303.

² See parts of codes relating to practice.

³ Id. 304.

⁴ Code Ref. 302.

(3) those permitted after judgment. Those made before trial may be (a) upon the application of the pleader himself to correct some error, supply some omission, withdraw some matter, or add some material allegation to his pleading; or (b) upon the decision sustaining a demurrer to the pleading, and the pleader is permitted to amend on terms; or (c) when an order is made to have a pleading made more definite and certain, and it must be amended to make it so; or (d) when an order has been made, striking out parts of a pleading, and it must be amended to properly connect the matter that remains.

228. Amendments, of Course, which are Permissible.

— The pleader may amend his pleading, of course, by striking out or withdrawing one or part of the causes of action stated in it;¹ or by adding a cause of action,² not inconsistent with the one stated in the original pleading;³ or by changing his prayer for relief, so as to include an injunction.⁴ And, generally, he may amend in any manner where the facts stated by way of amendment serve to explain, perfect, or more fully set forth the cause of action stated in the original pleading.⁵ In like manner the defendant may amend his answer by adding defences not pleaded in his original answer.⁶

The defendant may withdraw demurrer and serve answer under the statute giving leave to amend, of

¹ *Watson v. Rushmore*, 15 Abb. Pr. 51.

² *Brown v. Leigh*, 49 N. Y. 78.

³ *Sheldon v. Adams*, 41 Barb. 54; *Van Syckels v. Perry*, 3 Robt. 621.

⁴ *Getty v. Hudson, &c.* R. R. 6 How. Pr. 269.

⁵ *Hollister v. Livingston*, 9 How. Pr. 140; *Stryker v. Bank*, 28 How. Pr. 20; *Rutledge v. Vanmeter*, 8 Bush (Ky.), 354; *Taylor v. Moran*, 4 Metc. (Ky.) 130; *Valencia v. Couch*, 32 Cal. 339.

⁶ *McQueen v. Babcock*, 3 Abb. Ct. App. 229; *Wyman v. Remond*, 18 How. Pr. 272. See Dixon's note, 5 Wis. (revised ed.) pp. 628-629; *Thorn v. Smith*, 71 Wis. 18.

course;¹ but he cannot, it seems, withdraw answer and serve demurrer without leave.²

And when a pleading is demurred to,³ or a motion is made to strike it out, or to strike out matter contained in it,⁴ or make it more definite and certain,⁵ the pleader may amend it, within the proper time, of course, and thus defeat the object of the demurrer or motion.

The pleading can be *but once* amended, of course; that is, without first obtaining leave of court. And, where a plaintiff had served an amended complaint before time for answering expired, and then after answer served a second amended answer, it was held that he had no right to do so. He must obtain leave on terms before amending a second time.⁶

229. Amendments not Permissible, of Course.—The pleader is not allowed to amend his pleading, of course, by substituting an entirely new cause of action for that first stated.⁷ By the authorities in which this rule is tightly drawn, a complaint in tort cannot be amended to set up

¹ *Robertson v. Bennett*, 52 How. 287; *Bliss's Ann. Code*, 3d ed. p. 640 and notes.

² *Finch v. Pinden*, 19 Abb. Pr. 96; and see *Travest v. Alport*, 13 Civ. Proc. R. 161, 20 Abb. N. C. 4 n.; *Cashman v. Reynolds*, 123 N. Y. 138.

³ *Cooper v. Jones*, 4 Sandf. 699; *White v. Mayor*, etc. 5 Abb. Pr. 322.

⁴ *Welch v. Preston*, 58 How. Pr. 52; *Sutton v. Wegner*, 72 Wis. 294.

⁵ *Spytten Duyvil R. M. Co. v. Williams*, 1 Civ. Proc. R. 280.

⁶ *Jeroliman v. Cohen*, 1 Duer, 639; *Sands v. Calkins*, 30 How. Pr. 1.

⁷ See *Dixon's note to Brayton v. Jones*, 5 Wis. rev. ed. p. 628. This rule is applied more strictly in Wisconsin than New York. See *Brown v. Leigh*, 49 N. Y. 78, and cases cited in *Bliss's Ann. Code*, 3d ed. § 542. See also *Pom. Rem.* 2d ed. § 566; *Erickson v. Bennett*, 39 Minn. 326.

on the same facts a cause of action on contract;¹ nor can a complaint stating a cause of action at law be amended to state a cause in equity,² or *vice versa*, unless by consent of parties.³ The tests by which amendment can be distinguished from substitution are these: (1) that the same evidence will support both complaints; (2) that the same measure of damages will apply to both.⁴

230. Amendment of Answer introducing New Defences.—The defendant also is permitted to amend by introducing new defences. He stands on a different footing from the plaintiff, who can easily withdraw his suit and begin anew on a different theory, changing his suit from contract to tort, from law to equity, or *vice versa*, as may seem the better theory of his case. The defendant must be allowed to bring forward all his defences, to change them, add to them, substitute them, or his right is forever lost. Hence, greater lenity in amendment is allowed to the defendant than to the plaintiff.⁵ But the allowance of such amendments is within the sound discretion of the court, and will not be permitted, unless “in furtherance of justice.”⁶ The defendant will not be allowed to

¹ Carmichael v. Argard, 52 Wis. 607; but in most code States otherwise. See cases cited under par. 228.

² Stevens v. Brooks, 23 Wis. 196; Carmichael v. Argard, 52 Wis. 607; Fisher v. Laack, 76 Wis. 313; Powell v. Allen, 103 N. C. 46, 9 S. E. 138.

³ Lawe v. Hyde, 39 Wis. 345; Richards v. Smith, 98 N. C. 509.

⁴ Scovill v. Glassner, 79 Mo. 449; Newton v. Allis, 12 Wis. 378. And see Cumber v. Schoenfeld, 34 N. Y. S. R. 770; Fisher v. Rankin, 25 Abb. N. C. 191; Gas-Light Co. v. Rome, &c. R. R. Co. 51 Hun, 119; Bartell v. Bunn, 28 N. Y. S. R. 373.

⁵ Dixon's note to Brayton v. Jones, 5 Wis. 628, new ed.; Thorn v. Smith, 71 Wis. 24; Waters v. Bovell, 1 Wils. 223.

⁶ Code Ref. 309; State v. Homey, 44 Wis. 615; Allen v. Ransom, 44 Mo. 263; Clark v. Spencer, 14 Kan. 398; Spanagel v. Reay, 47 Cal. 608.

"spring" new defences on the plaintiff at a late stage in the action. He must show a good reason for, and good faith in proposing, his amendments.¹

231. Amendments, of course, must be made in Good Faith.—They will be stricken out, on motion of the adverse party, if made without necessity, or for the purpose of delay, so as to cause the opposite party to lose the benefit of a term of court.² When an unauthorized amendment is made, the opposite party should refuse to accept it, return promptly the amended pleading, or move to strike it out.³ When stricken out, the parties are in their former positions.⁴ Nor will amendments be allowed to set up immaterial averments.⁵

232. The Amendments must be necessary.—If the pleading is fatally bad, an amendment will not be allowed that does not cure the defect,⁶ nor one consisting of immaterial averments.

233. The effect of amendment is to substitute the amended pleading for the original, and the latter ceases to perform any function as a pleading;⁷ and if the amended pleading be demurred to, it cannot be helped

¹ See cases cited in next note; *Allen v. Compton*, 8 How. Pr. 251.

² Code Ref. 303; *Ostrander v. Conkey*, 20 Hun, 421; *Frank v. Bush*, 2 Civ. Proc. R. 250.

³ *Hollister v. Livingston*, 9 How. Pr. 140; *Follower v. Laughlin*, 12 Abb. Pr. 105.

⁴ *Frank v. Bush*, 63 How. Pr. 282.

⁵ *Willamette, &c. Co. v. Los Angeles, &c. Co.* 94 Cal. 229.

⁶ *Shannon v. Slater*, 9 So. 851; *Willamette, &c. Co. v. Los Angeles, &c. Co.* 94 Cal. 229.

⁷ *Gillman v. Cosgrove*, 22 Cal. 356; *Barber v. Reynolds*, 33 Cal. 497; *Brown v. Gal. Min. Co.* 32 Kan. 528; *Kapp v. Barthan*, 1 E. D. Sm. 662; *Hanscom v. Herrick*, 21 Minn. 9; *Sands v. Calkins*, 30 How. Pr. 1; *Bank v. Tel. Co.* 30 Ohio St. 555. But see *Kostendader v. Pierce*, 37 Ia. 645; *Hooker v. Brandon*, 75 Wis. 8.

out by allegations in the original not embraced in the amended pleading. The amendment relates back to the commencement of the action.¹ But it often happens, especially in amendments on the trial or on appeal, that the court orders them inserted in the original on file, without requiring new engrossment of the pleading.² And the old pleading may be offered in evidence.³

234. Amendment as to Parties.—The plaintiff can amend by leave of the court— (1) By adding or bringing in additional parties;⁴ (2) By striking out names of parties;⁵ (3) By correcting a mistake in the name of a party;⁶ (4) By giving the true name of a party sued by a fictitious name;⁷ (5) By changing the capacity in which one sues⁸ or is sued,⁹ making the suit begun by or against one as administrator, etc., to stand by or against him individually, or *vice versa*.¹⁰

¹ Ward v. Kalbfleisch, 21 How. Pr. 283; Worley v. Moore, 97 Ind. 15; Barber v. Reynolds, 33 Cal. 497.

² Fitzpatrick v. Gebhart, 7 Kan. 35.

³ Folger v. Boyington, 67 Wis. 447; Fogg v. Edward, 20 Hun, 90; Strong v. Dwight, 11 Abb. N. S. 319.

⁴ Code Ref. 84-86.

⁵ Code Ref. 309; Doane v. Houghton, 75 Cal. 360.

⁶ Code Ref. 309; Weaver v. Young, 37 Kan. 70; Beggs v. Wellman, 82 Ala. 391.

⁷ Code Ref. 45; Sacramento v. Spencer, 53 Cal. 737; Farris v. Merritt, 63 Cal. 118.

⁸ Eddy v. Powell, 49 Fed. Rep. 814; Lucas v. Pittman, 10 Southern Rep. 603; or when several sue as a voluntary association, their individual names may be substituted as plaintiffs. Lilly v. Tobbein, 103 Mo. 477.

⁹ Tighe v. Pope, 16 Hun, 180.

¹⁰ Ramsey v. Cattle Co., 6 Mont. 498. But an entire substitution of parties will not be permitted (Hall v. School Dist. 36 Mo. App. 21; Leibman v. McGraw, 3 Wash. 520; 28 Pac. Rep. 1107; St. Louis, &c. R. R. Co. v. Miller County, 19 S. W. Rep. 572), unless it be in cases where, pending the suit, there has been a transfer of interest or devolution of liability, in which case most of the codes provide for substitution.

235. How made. — The amendment of a pleading should be made — (1) When, of course, by serving a new pleading in which the amendments are incorporated, which pleading should be designated the “amended complaint,” “amended answer,” etc., and so indorsed; (2) When made on leave of court, the pleading should be written out as amended and served anew, unless the order allowing the amendment prescribes a different manner; (3) When amended at the trial, the order noted in the minutes should specify the manner of amendment, and the pleading be amended accordingly; (4) When amended after trial, the order should specify what the amendment is, and direct the manner of its incorporation into the record; * (5) The parties may stipulate to let in an amendment, thus: —

Title of Cause. }

The parties hereto, by their respective attorneys, hereby stipulate that the complaint herein shall be and is hereby amended, without further service or notice, as follows: By striking out [*here specify the matter stricken out*], and by inserting the following allegations: [*here specify matter inserted*]. But this stipulation shall not be deemed an admission of any matters whatever.

_____,
Signatures of Attorneys.

Dated.

When a party makes application for leave to amend, his notice of application should in substance specify in

* **NOTE.** — Consult *Milliken v. Houghton*, 4 West C. Rep. (Cal.) 221; *Livermore v. Bainbridge*, 14 Abb. Pr. n. s. 232; *Eigenman v. Rockport, &c. Ass'n*, 79 Ind. 41; *Flanders v. Wood*, 24 Wis. 572; *Ballou v. Parsons*, 11 Hun, 602; *M'ch'nts' Ins. Co. v. Excelsior Ins. Co.* 4 Mo. App. 578; *Simmons v. Rust*, 39 Ia. 241; *Giddings v. Giddings*, 57 Ia. 297; *Lane v. Hayward*, 28 Hun, 583; *Holmes v. Campbell*, 12 Minn. 221.

what respects he desires to amend,¹ so that the court may judge of the materiality and admissibility of the amendment.²

235 a. Amendments at the trial may be allowed, in the discretion of the court, (a) to add the name of a party,³ (b) to strike out the name of a party,⁴ or (c) to correct a mistake in the name of a party,⁵ or (d) a mistake in any other respect,⁶ or (e) by adding allegations material to the case,⁷ or (f) by conforming the pleadings to the facts proved, when it does not change substantially the claim or

¹ *State v. Homey*, 44 Wis. 615; *Barker v. Walbridge*, 14 Minn. 469; *Kerr v. Reece*, 27 Kan. 338.

² *State v. Homey*, 44 Wis. 615; *Bewley v. Eq. Ins. Co.* 61 How. Pr. 344, 349.

³ Code Ref. 309; *Challoner v. Howard*, 41 Wis. 355; *Brown v. Gas-Light Co.* 16 Wis. 556; *Mead v. Bagnall*, 15 Wis. 156.

⁴ Code Ref. 309; *Chittengo, &c. Co. v. Stewart*, 67 Barb. 423; *Davis v. Schermerhorn*, 5 How. Pr. 440; *Pomeroy v. Sperry*, 16 How. Pr. 211; *Bannerman v. Quackenbush*, 11 Daly, 529; *Knapp v. Hungerford*, 7 Hun, 588.

⁵ Code Ref. 309; *Witte v. Meyer*, 11 Wis. 295; *McIndoe v. Hazelton*, 19 Wis. 597; *Travis v. Tobias*, 8 How. Pr. 333; *N. Y. Milk-Pan Co. v. Remington Works*, 89 N. Y. 22; *Barnes v. Perrine*, 9 Barb. 202; 15 Barb. 250; 12 N. Y. 18; *Heckemann v. Young*, 18 Abb. N. C. 196; *Fuller v. Webster Fire Ins. Co.* 12 How. Pr. 293.

⁶ Code Ref. 309; *Bliss's Ann. Code (N. Y.)*, pp. 882-905; *Ward v. Parlin*, 46 N. W. (Neb.) 529.

⁷ Instances of allegations added or changed as "material to the case" are the following: changing claim on note to claim for goods sold as consideration for the note, *Vibbard v. Roderick*, 51 Barb. 616; changing claim on certificate of indebtedness to claim for services, *Woolsey v. Rondout*, 4 Abb. Ct. of App. 639; changing claim of title as alleged, *Barber v. Marble*, 2 Thomp. & Cook, 114; changing claim for use and occupation to one for rent due on lease, *Bedford v. Terhune*, 30 N. Y. 453; changing allegation of joint liability to one of joint and several liability, *Field v. Van Colt*, 15 Abb. Pr. n. s. 349; or of several to joint liability, *Bacon v. Comstock*, 11 How. Pr. 197; adding allegations as to partnership, *Bischoff v. Blease*, 20 S. C. 460.

defence.¹ But this power of amendment cannot be exercised to the extent permitting a complaint which states no cause of action whatever,² or an answer which states no defence whatever to be amended so as to state a cause of action or defence.

235 b. Amendments to let in Unconscionable Defences.

—It is a familiar rule of the former systems that a defendant would not be allowed to amend his plea or answer so as to add an unjust, unconscionable, or “hard” defence, such as the plea of the Statute of Limitations or of Usury. Under the code provisions above quoted it is held in some States that such amendments may be interposed, of course³ within the proper time, and that the court may allow them in discretion to be interposed when leave is applied for.⁴ The old rule, that pleadings will not be amended to let in

¹ Instances of refusal of amendment where it would operate to change the cause of action; where it would change an action for fraud into one on contract. *Barnes v. Quigley*, 59 N. Y. 265; *Lewark v. Carter*, 117 Ind. 206; *Powell v. Allen* (N. C.), 9 S. E. 138; *Slernecker v. Thein*, 11 Wis. 556; *Sweet v. Mitchell*, 15 Wis. 641.

² *Curtis v. Curtis*, 7 Neb. 315; *K—— v. H——*, 20 Wis. 156; *Bowen v. Sweeney*, 44 N. Y. S. Rep. 182; 63 Hun, 224; but where the complaint tends to show that the plaintiff has a cause of action, but the statement of the facts is faulty he may amend. *Harvey v. Hackney*, 35 S. C. 361; 14 S. E. 822. This rule that the complaint must state a cause of action is subject to the qualification that where the case has been tried by both parties on the theory that a cause was alleged, and it seems to have been rightly understood by the adverse party, the court will permit amendment or even allow pleadings to be filed. See para. 249, 251.

³ *Un. Nat. Bank v. Bassett*, 3 Abb. Pr. (n. s.) 359; *Barnett v. Meyer*, 10 Hun, 109; *Anthony v. Day*, 5 N. Y. Week. Dig. 240; *Hornfager v. Hornfager*, 6 How. Pr. 13. This is also held in California (*Van Maren v. Johnson*, 15 Cal. 308), and South Carolina (*McCaalan v. Latimer*, 17 S. C. 123), and in Missouri (*Bradley v. Ins Co.* 28 Mo. App. 7), *McNider v. Sirrine* (Ia.), 50 N. W. 200.

⁴ *Id.*

unconscionable defences, such as the Statute of Limitations, Usury, and the like, is changed by the code provision to this extent: it is within the "discretion of the court" to allow or refuse the amendment. It may allow the amendment "in furtherance of justice." In some cases, for example, where the laws of a State declared a contract tainted with usury utterly void, the courts would hesitate to let in a defence after the defendant had failed to plead it at the proper time;¹ but where the statutes require the principal, or the principal and lawful interest, to be tendered before usury can be pleaded, the amendment can oftentimes be allowed in furtherance of justice.² In some instances, it is held discretionary with the courts to refuse an amendment to let in the Statute of Limitations,³ in others, to allow it to be pleaded.⁴

SECTION II.

THE VERIFICATION OF PLEADINGS.

236. Verification of Pleadings.—In the technical language of the common law a verification is an offer to prove a statement of new matter in a pleading, and is expressed by the clause, "and this the plaintiff (or defendant) is ready to verify." The verification of the codes is a short affidavit appended to the pleading by which the party, or some person authorized by law in his behalf, makes oath to the truth of the pleading.⁵

237. The object of the verification is to secure truthfulness in the allegations, and prevent "sham" or false pleadings from being interposed.

¹ See *Dale v. Northrop*, 19 Wis. 249; *Jones v. Walker*, 22 Wis. 220.

² *Id.*

³ *Plumer v. Clark*, 59 Wis. 646.

⁴ *Smith v. Dragert*, 61 Wis. 222.

⁵ Code Ref. 225, 226.

238. How made.—The verification is a sworn statement in the form of an affidavit. Its effect, in most of the codes, is that the pleading is true to the knowledge of the person verifying it, except as to those matters stated on information and belief; and as to those matters, he believes it to be true.¹ In some States, which copy the Ohio code, every pleading must be verified, but is sworn to on belief only.²

239. By whom verified.—A pleading may be verified: (1) By the party who pleads;³ (2) When two or more are united in interest and pleading together, by any one or more of them acquainted with the facts;⁴ (3) By an agent or attorney (*a*) when the action or defence is founded on a written instrument for the payment of money only which is in possession of the agent or attorney,⁵ (*b*) when all the allegations are within his personal knowledge, and (*c*), in New York, when the party is a foreign corporation, or when there are two or more parties united in interest and pleading together and neither of them acquainted with the facts is within the county and capable of making the affidavit; (4) When a corporation is a party, by some officer of the same;⁶ (5) When a party is an infant or insane, usually by guardian or attorney;⁷ (6) When the State is a party, by an officer or person acquainted with the facts⁸ in some States, in others none is required.⁹

240. When a Pleading must be verified.—(1) In most of the States a party may have his pleading verified, and thus require all subsequent pleadings by way of response,¹⁰ except demurrers, to be verified.¹¹ But if the plaintiff serves his complaint unverified, the defendant need not verify

¹ Code Ref. 226.

² Id. 228, 232.

³ Id. 229.

⁴ Id. 229–231.

⁵ Id. 235.

⁶ Id. 234.

⁷ Id. 237.

⁸ Id. 239.

⁹ Id. 240.

¹⁰ *Reynolds v. Smathers*, 87 N. C. 24; *Rankin v. Allison*, 64 Id. 673.

¹¹ Code Ref. 225.

his answer. (2) In a few States all pleadings must be verified, at least on belief.¹ (3) In others all dilatory pleas must be verified.² (4) Several States permit infants, insane, and persons imprisoned to plead without verifying.³ As to some other minor points, see Code References, 244-253.

241. When not made by a Party, the Reason why is to be stated.⁴*

242. Forms of Verifications. — The verifications, under the more general code provisions, may be in the following forms: —

VERIFICATION BY PARTY.

State of —, } ss.
 — County, }

A B, being first duly sworn, on oath says that he is one of the plaintiffs in the above entitled action; that he has (heard) read the foregoing complaint, and knows the contents thereof, [*] and that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

Subscribed and sworn to before me } A B.
 this — day of —, A. D. 18—. }

_____,
Notary Public,

— County.

(Or other officer authorized to administer oaths.)

VERIFICATION BY ATTORNEY HAVING PERSONAL KNOWLEDGE OF THE FACTS.

(Venue) ss. C D, being first duly sworn, on oath says that he is the attorney for the plaintiff in the above entitled action;

¹ Code Ref. 232.

² Id. 241.

³ Id. 247.

⁴ Id. 238.

* NOTE. — For decisions illustrating the application of the rules as to verifications, consult cases cited in Bliss's Ann. Code, N. Y. vol. i. 3d ed. pp. 579-588; S. & B. Wis. Sts. p. 1549; notes to Boone's Code Forms, pp. 5, 6; Abbott's New Practice and Forms, vol. ii. p. 437; and the annotated codes of the other States.

that he has read the foregoing complaint, and knows the contents thereof, and that the same is true [*] to his own knowledge; and that the reason this affidavit is not made by the plaintiff is that all the allegations aforesaid are within affiant's personal knowledge.

C D.

(*Jurat.*)

VERIFICATION BY ATTORNEY ON BELIEF.

[*As in above down to the star*]; and that the same is true as he verily believes. That the reasons why this verification is not made by the plaintiff are that said action is founded on an instrument for the payment of money only, which instrument is now in affiant's possession as such attorney, and constitutes the grounds of his belief in the premises; and the said plaintiff is not now within the county of —, where the affiant resides and is, but is now, as affiant believes, in the — of —, in the State of —.

(*Signature.*)

(*Jurat.*)

VERIFICATION BY ONE OF SEVERAL PARTIES UNITED IN INTEREST AND PLEADING TOGETHER.

[*As in first preceding form down to star*], that he is acquainted with the facts alleged in said complaint, and that the same is true to his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

(*Signature.*)

(*Jurat.*)

SECTION III.

STRIKING OUT PLEADINGS OR PARTS THEREOF.

243. What Pleadings may be stricken out entirely.—

1. *Sham Pleadings* are those good in form but false in fact, and interposed for delay.¹ At common law, a few sham

¹ *Gostorf v. Taafé*, 18 Cal. 385; Ind. Code, § 382.

pleadings had by relaxation of rules come to be admitted.¹ Under the codes sham pleadings are not allowed, and will be stricken out on motion of the adverse party. The codes generally expressly so provide,² but the power to strike them from the files is one possessed by courts of record independently of statutory authority.³

But while a pleading may be false, it cannot always be stricken out as sham. To warrant this summary mode of disposing of a defence, the mere reading of the pleadings should be sufficient to disclose without deliberation and beyond doubt that no defence is shown.⁴ Nor can a defence good in form be stricken out as sham, if verified or supported by affidavit.⁵ A pleading setting up facts which have been adjudicated as insufficient on the decision of a demurrer will be stricken out as frivolous.⁶*

2. *Frivolous pleadings*, which are usually answers, replies, or demurrers. A frivolous answer or reply is one that denies no material allegation, and sets up no defence,⁷ and is interposed in bad faith, for delay.⁸ It must

¹ *Ante*, par. 42; Steph. on Pl. s. vii. Rule ix. ² Code Ref. 295.

³ *M'fres Bank v. Hitchcock*, 14 How. Pr. 406; *Wayland v. Tyson*, 45 N. Y. 281.

⁴ *Cottrill v. Cramer*, 40 Wis. 559.

⁵ Code Ref. 296; *People v. Macumber*, 18 N. Y. 315.

⁶ *Wing v. Red Oak Dist. (La.)*, 48 N. W. 977; *McWhorter v. Andrews (Ark.)*, 13 S. W. 1099.

⁷ *Hull v. Smith*, 8 How. Pr. 149; *Crane, &c. Co. v. Morse*, 49 Wis. 368.

⁸ *Farmers', &c. Bk. v. Sawyer*, 7 Wis. 379; *Am. &c. S. Mch. Co. v. Hill*, 27 S. C. 164.

* NOTE. — As to instances of sham pleading, the following cases are cited: *Gostoris v. Taafe*, 18 Cal. 385; *Beeson v. McConnaha*, 12 Ind. 420; *Mooney v. Musser*, 34 Ind. 373; *Foren v. Dealey*, 4 Ora. 92; *Wayland v. Tyson*, 45 N. Y. 281; *Leach v. Boynton*, 3 Abb. Pr. 1; *Littlejohn v. Greeley*, 22 How. Pr. 345; 13 Abb. Pr. 311; *Brown v. Jennison*, 3 Sandf. 732; *Hull v. Smith*, 1 Duer, 649; *People v. Macumber*, 18 N. Y. 315; *Wedderspoon v. Rogers*, 32 Cal. 569; *Frost v. Harford*, 40 Cal. 166; *Reynolds v. Krans*, 42 N. Y. S. R. 624; *Wis. Cent. Ry. Co. v. Ashland Co.* 81 Wis. 1.

be apparent on its face, upon mere inspection, that the pleading is utterly invalid.¹ If an argument is necessary to demonstrate its invalidity, the pleading will not be deemed frivolous, though it may be held upon argument to be insufficient.^{2 *}

3. *Unverified pleadings* in a few jurisdictions may be stricken out;³ in others the objection is taken by returning the pleading for the reason that it is not verified.⁴

4. *Other grounds for striking out* are indicated by statute or court rule in some States.⁵ See *ante*, §§ 220, 222.

5. *Frivolous Demurrers* are attacked by motion to strike them out and for judgment.⁶ In some States (New York, North Carolina, and South Carolina⁷) the practice is to treat them as nullities, and move for judgment. The demurrant, by his demurrer, admits the facts alleged in the pleading demurred to, and his grounds of demurrer being frivolous, the other party is entitled to judgment on the pleadings. But there is generally in the codes a discretion given the court to allow the demurrant to plead over.⁸

¹ *Martin v. Weil*, 8 Wis. 220; *Lerdall v. Charter Oak Ins. Co.* 51 Wis. 426; *Cook v. Warren*, 88 N. Y. 37.

² *Wise v. Gessner*, 47 Hun, 306; *McConihe v. McClurg*, 13 Wis. 454.

³ Code Ref. 242, 243. ⁴ This is generally regulated by court rules.

⁵ For failure to file copy for adverse party in Iowa, *Searles v. Lux* (Ia.), 52 N. W. 327. An answer containing only an argument, *Gilchrist v. Helena, &c. R. R. Co.* 47 Fed. Rep. 593. The pleading of a party in contempt for wilfully disobeying a subpoena, *Clifford v. Allman*, 84 Cal. 528.

⁶ Code Ref. 294.

⁷ *Id.*

⁸ Code Ref. 294. In Wisconsin, the motion to strike out is now virtually an argument of the demurrer. *Madgeburg v. Uihlein*, 53

* NOTE. — For instances of pleadings held frivolous and otherwise, consult cases cited in Bliss's Ann. Stats. N. Y. 3d ed. vol. i. pp. 620-625; *Lerdall v. Charter Oak Ins. Co.* 51 Wis. 426; *Platt v. Robinson*, 10 Wis. 128; *Milwaukee v. O'Sullivan*, 25 Wis. 666; *Grubb v. Remington*, 7 Wis. 349; *Brayley v. Pickett*, 28 Wis. 598; *Sage v. McLean*, 37 Wis. 357; *Crowns v. Forest Land Co.* 99 id. 103.

244. What Matter may be stricken out of Pleadings. —

1. *Irrelevant matter*, which is such as has no substantial relation to the controversy between the parties to the action.¹ Irrelevancy comprehends (a) prolixity or needless details of material matter, and (b) matter out of which no cause of action or defence could arise, and which cannot in any aspect affect the decision of the court.² It must be clearly and palpably irrelevant to justify an order striking it out.³

2. *Redundant Matter.* — This is distinguished from irrelevant matter in this: A needless repetition of material averments, while not irrelevant, is redundant.⁴ "If the matter cannot be made the subject of a material issue, it has no business in the pleading and ought not to be left there."⁵ Redundancy is surplusage which tends to cumber the record, and may prejudice the other party.

It is to be observed that motions to strike out for irrelevancy or redundancy are addressed to the discretion of the court; and under the general policy of code reform, errors that do not mislead the adverse party or prejudice his case are disregarded;⁶ and irrelevant or redundant

Wis. 165. The sufficiency of the pleading is considered as on demurrer. If a pleading is bad, it may be stricken out as frivolous; and on appeal from an order striking out a pleading as frivolous, the order will not be reversed, if the pleading was bad in substance. *Diggle v. Boulden*, 48 Wis. 477; *Lerdall v. Ins. Co.* 51 Wis. 426; *Krall v. Libby*, 53 Wis. 295.

¹ *Seward v. Miller*, 6 How. Pr. 313; *Fasnacht v. Stehn*, 53 Barb. 650.

² *Bank v. Kitching*, 11 Abb. Pr. 435; *Weber v. Schwartz*, 12 N. Y. S. R. 621; *Aubrey v. Fisk*, 36 N. Y. 47.

³ *Averill v. Taylor*, 5 How. Pr. 476; *Walter v. Fowler*, 85 N. Y. 621.

⁴ *Bowman v. Sheldon*, 5 Sandf. 657; *Carpenter v. Reynolds*, 58 Wis. 666; *Durch v. Chippewa Co.* 60 id. 227.

⁵ *Plank Road Co. v. Wetzel*, 6 How. Pr. 68; *Phillips' Code*, Pl. § 281.

⁶ *Code Ref.* 315.

matter will not be eliminated where it does not tend to seriously prejudice the other party.¹ Statements of evidentiary matter will be stricken out as redundant,² as is held by some authorities.*

3. *Scandalous Matter*.—Scandal in a pleading consists in the allegation of anything unbecoming the dignity of the court to hear, or which is contrary to good manners, or charges some one with a crime not necessary to be shown in the cause, and which bears cruelly upon the moral character of an individual.³ The court has inherent power to strike out such matter. The attorney who inserts it may be himself ordered to pay the costs;⁴ and all the codes provide for its expunction from the pleadings.⁵

SECTION IV.

MOTIONS TO MAKE PLEADING MORE DEFINITE AND CERTAIN.

245. *Indefinite or uncertain allegations, etc.*, when contained in a pleading, are not ground for demurrer,⁶

¹ *Clarke v. Harwood*, 8 How. Pr. 470; *Pacific Mart S. S. Co. v. Irwin*, 67 Barb. 277; *Phillips' Code Pl.* § 283.

² *Wooden v. Strew*, 10 How. Pr. 48; *Williams v. Hayes*, 5 How. Pr. 470; *Marrone v. N. Y. Jockey Club*, 44 N. Y. S. R. 455; *Petree v. Fielder*, 3 Ind. App. 129; *Carpenter v. Reynolds*, 58 Wis. 666.

³ *Daniell Ch. Pr.* 347; *Wood v. Morrell*, 1 Johns. Ch. 103; *ante*, par. 73.

⁴ *Code Ref.* 293; *McVey v. Cantrell*, 8 Hun, 522.

⁵ *Code Ref.* 293.

⁶ *Code Ref.* 299; *Lorillard v. Clyde*, 86 N. Y. 384; *Roe v. Lincoln Co.* 56 Wis. 60.

* **NOTE.**—As to redundancy and motions to strike out such matter, consult cases cited in *Bliss's Ann. Stats. N. Y.* 3d ed. § 545, and notes; *Davis v. C. & N. W. Ry. Co.* 46 Ia. 394; *Carpenter v. Reynolds*, 58 Wis. 666; *Durch v. Chippewa Co.* 60 id. 227; *Cathcart v. Peck*, 11 Minn. 45.

except in California, Colorado, Idaho, Montana, Nevada, and Utah.¹ Elsewhere they are met by motion to make the pleading more definite and certain.² This motion may be made in the following instances, among others too numerous to be here mentioned: (1) When the allegations of a complaint are so indefinite and uncertain that the nature of the action cannot be understood therefrom.³ (2) When the allegations are so vague that it does not appear therefrom in what capacity a party sues or is sued.⁴ (3) When the allegations are uncertain or indefinite as to time, place, quantity, title, person, or any other matter required to be pleaded with certainty in the particular case.⁵ (4) When the allegations of a pleading are faulty in duplicity, setting up two grounds for a single claim.⁶ (5) When two causes of action which may be united in the same complaint are jumbled into one count or statement,⁷ instead of being separately stated. (6) When defences which ought to be separately and distinctly stated are confusedly given in one statement.⁸ (7) When denials are so indefinite and uncertain that it cannot be understood what is denied and what is admitted.⁹

¹ Code Ref. 136, 197, 300.

² *Id.* 299.

³ *Faulkes v. Camp*, 40 N. Y. Sup. Ct. 70.

⁴ *Jones v. Norwood*, 37 N. Y. Sup. Ct. 35; 66 N. Y. 616; *Partridge v. Haley*, 20 N. Y. Week. Dig. 320.

⁵ *Thatcher v. Morris*, 11 N. Y. 437; *Vermilya v. Beatty*, 6 Barb. 429; *People v. Ryder*, 12 N. Y. 433; *Lester v. Jewett*, 11 N. Y. 453; *Hansa v. Cutting*, 11 N. Y. S. R. 891.

⁶ *Gardner v. Locke*, 2 Civ. Proc. 252; *Dorr v. Mills*, 3 Civ. Proc. 7.

⁷ *Bass v. Comstock*, 36 How. Pr. 382; *Freer v. Denton*, 61 N. Y. 492; *Clarke v. Langworthy*, 12 Wis. 441; *Sentinel Co. v. Thompson*, 38 Wis. 489; *Bank v. Baylis*, 41 Mo. 274; *Hardy v. Miller*, 11 Neb. 295.

⁸ Code Ref. 160; *Kerr v. Hayes*, 35 N. Y. 331.

⁹ *Farnsworth v. Wilson*, 5 Civ. Proc. R. 179 n.; *Spies v. Roberts*, 18 Jones & Sp. 301; *Phillips' Code Pl.* § 284.

(8) When the pleader mingles general and specific allegations so as to leave his meaning uncertain.¹ (9) When facts are stated loosely and generally, but in such manner, that the pleading would be aided by verdict or finding.² (10) When a partial defence is not pleaded as such, it may be required to definitely so state.³

246. When Motion must be made.—The motion should be made before trial,⁴ and will receive little favor from the court when made at the trial, or on appeal. It ought to be made within the period allowed for pleading.⁵

247. How Motion determined.—The motion is to be determined upon the face of the pleading by inspection of it.⁶

SECTION V.

OBJECTIONS TAKEN BY ANSWER.

248. Objections taken by Answer.—The several grounds of demurrer, enumerated in their proper connection,⁷ when not appearing on the face of the pleading, may be taken by answer to it.⁸ In respect to this subject, sufficient has already been explained in the chapters on Demurrers and Answers.⁹

¹ *Madden v. Ry. Co.* 30 Minn. 453.

² *Horn v. Ludington*, 28 Wis. 81; *post*, p. 302.

³ *Simmons v. Simmons*, 21 Abb. N. C. 469. See *Thompson v. Halbert*, *Id.* 266.

⁴ *Smith v. Woodruff*, 1 Handy, 276; *Osborn v. Graves*, 11 Ore. 526; *Farmers', &c. Bank v. Sherman*, 6 Bosw. 181; 33 N. Y. 69; *Germania Bank v. Distler*, 67 Barb. 333; *St. Louis, &c. R. R. Co. v. Snavely*, 47 Kan. 637; *Garard v. Garard*, 135 Ind. 15.

⁵ *Hammond v. Earle*, 5 Abb. N. C. 105.

⁶ *Cook v. Matteson*, 33 N. Y. S. R. 497.

⁷ *Ante*, pp. 214-226.

⁸ Code Ref. 141.

⁹ *Ante*, pp. 227-248.

The objection that the action is barred by the Statute of Limitations is taken in some jurisdictions, as has been shown, by demurrer, when apparent on the face of the complaint. In other jurisdictions it must be taken by answer, and in all may be so taken.¹

SECTION VI.

CONSTRUCTION OF PLEADINGS.

249. Pleadings liberally construed.—The rule of the common law, intended to secure certainty and prevent ambiguity or doubt as to meaning, is that when two or more meanings present themselves in the pleading, that construction which is most unfavorable to the pleader shall be adopted.² The codes adopt a more liberal rule in the provisions found in nearly all of them, that “in the construction of a pleading for the purpose of determining its effect, the allegations shall be liberally construed, with a view to substantial justice between the parties.”³ Contrary to the common-law rule, every reasonable intentment is to be made in favor of the pleading;⁴ and if matter is capable of different meanings, that which supports the pleading will be adopted.⁵ The pleading must, however, be construed according to what it says, and not what the pleader intended,⁶ and the law will not assume any fact in favor of a party which is not averred.⁷

¹ Code Ref. 135, 278.

² Steph. on Pl. s. v. Rule ii.

³ Code Ref. 259.

⁴ *Morse v. Gilman*, 16 Wis. 504; *Busta v. Wardall* (S. D.), 52 N. W. 418; *Isaacs v. Holland* (Wash.), 29 Pac. 976.

⁵ *Allen v. Patterson*, 7 N. Y. 476; *Olcott v. Carroll*, 39 N. Y. 436.

⁶ *Gould v. Glass*, 19 Barb. 179; *Ogdensburg Bank v. Van Rensselaer*, 6 Hill, 240; *Gale v. James*, 11 Col. 540; 19 Pac. 446.

⁷ *Cruger v. Hud. Riv. R. R. Co.* 12 N. Y. 190, 201.

In the application of this rule, the following are among the more prominent points found in the cases: (1) Verified allegations will be construed with reference to each other, and harmonized if possible.¹ (2) When there is doubt as to the nature of the action, the summons and the demand for relief may be considered to determine.² (3) When facts and legal conclusions are alleged, the facts will control;³ and denials of fraud will not avail against admissions of fact showing fraud.⁴ (4) Words will be construed in their ordinary and popular sense.⁵ Where a word has different meanings, — one a judicial or statutory definition, the other inaccurate popular use, — the latter will be the meaning given it when it is plain from the whole pleading that such was the sense in which the pleader used it.⁶ (5) The use of one word or name for another, by clerical mistake, will not vitiate the pleading where there is no doubt as to the one intended to be used.⁷ (6) Pleadings will not be judged from their general statements or detached sentences, but from their whole scope and tenor.⁸ (7) Abbreviations which can be clearly understood in the connection in which used, and not ambiguous, are read as if the word were written in full.⁹ Common abbreviations, descriptions of land by figures, by initials, etc., well known and used, will be judicially

¹ *Ryle v. Harrington*, 14 How. Pr. 59; *Sylvia v. Sylvia*, 11 Col. 319; 17 Pac. 912.

² *Rodgers v. Rodgers*, 11 Barb. 595; *Gillett v. Treganza*, 13 Wis. 172; *Lowber v. Connit*, 36 Wis. 176.

³ *Jones v. Phoenix Bank*, 8 N. Y. 228, 235.

⁴ *Robinson v. Stewart*, 10 N. Y. 189.

⁵ *Woodbury v. Sackrider*, 2 Abb. Pr. 402.

⁶ *Cook v. Warren*, 88 N. Y. 37.

⁷ *Warbritton v. Demorrett*, 129 Ind. 351.

⁸ *Clore v. McIntire*, 120 Ind. 262.

⁹ *Odd Fellows' Building Assoc. v. Hogan*, 28 Ark. 261; *Smith v. Butler*, 25 N. H. 521.

noticed,¹ as will the known and accepted abbreviations of Christian names,² names of months,³ States, etc.⁴ (8) Where a complaint alleges facts in such manner that a cause of action is stated on contract and in tort, it will be deemed to be on contract,⁵ and the allegations of tortious intendment will be stricken out.⁶ (9) Especially when the adverse party has not attacked a pleading by demurrer or motion to make more definite and certain, will the rule of liberal construction be applied against objections made for the first time at the trial,⁷ or on appeal.⁸

250. Illustrative Instances.—The rule of liberal construction of pleadings is illustrated by the following decisions: The averment that an agreement was made held to import a lawful, valid agreement (*Pettit v. Hamlyn*, 43 Wis. 814). That a deed was “executed,” implies that it was signed, sealed, and delivered (*Thorp v. Keokuk Coal Co.* 48 N. Y. 253). The allegation that defendant accepted implies a due acceptance (*Graham v. Machado*, 6 Duer, 514; *Partridge v. Badger*, 25 Barb. 146). Acceptance by a corporation by its treasurer held to imply averment of his authority to accept (*Id.*). The allegation of “due

¹ *Kile v. Yellowhead*, 80 Ill. 208; *Jordan, &c. Assoc. v. Wagoner*, 33 Ind. 50.

² *Moseley v. Mastin*, 37 Ala. 216.

³ *Kearns v. State*, 3 Blackf. 334.

⁴ *Burrough v. Wilson*, 59 Ind. 536. But see *Ellis v. Park*, 8 Tex. 205.

⁵ *Seelye v. Zimmer*, 40 N. Y. S. R. 604; *Ridder v. Whitlock*, 12 How. Pr. 208.

⁶ *Hunter v. Powell*, 15 How. Pr. 221. But see *Supr's v. Decker*, 30 Wis. 624.

⁷ *St. John v. Northup*, 23 Barb. 25; *Wall v. Buffalo Water Works*, 18 N. Y. 119; *Hazelton v. Union Bank*, 32 Wis. 34.

⁸ *Evans v. Schafer*, 88 Ind. 92; *Samuels v. Blanchard*, 25 Wis. 229.

notice" held to imply sufficient notice (*Kusterer v. Beaver Dam*, 52 Wis. 146). The averment that a trespass was committed on or about a certain day, held sufficient on demurrer (*Leihy v. Lumber Co.* 49 Wis. 165). The word "agreed" used in a complaint construed to mean a valid agreement (*Stearns v. St. L. &c. R. R. Co.* 4 N. Y. S. Rep. 716). "Duly issued" held to imply issue of execution on leave of court, where such leave was necessary (*Jones v. Davis*, 22 Wis. 422).

SECTION VII.

AIDERS OF DEFECTIVE PLEADINGS.

251. Defective Pleadings — how cured. — Many defects, that might afford ground for demurrer or motion, are cured by waiver of objection to them or by subsequent proceedings in the action. The instances in which this may happen are here briefly summarized: —

1. *Waiver of Objection.* — It is expressly provided by the codes that such objections as (a) want of legal capacity to sue, (b) the pendency of another action between the same parties for the same cause, (c) defect of parties, (d) the improper joinder of causes of action, which are grounds of demurrer when appearing on the face of a complaint or petition,¹ and of answer when they do not,² are waived when not taken by demurrer or answer.³ So it is of such objections as that a pleading is not subscribed or verified,⁴ or that the separate counts are not numbered,⁵ or suing by initial instead of full Christian name,⁶ and others of like character.

¹ Code Ref. 128-140.

² Id.

³ Id. 148.

⁴ *State v. Chadwick*, 10 Ore. 423.

⁵ *Cobbe v. R. R. Co.* 38 Ia. 601.

⁶ *Nichols v. Dobbins*, 2 Mont. 540.

2. *Aider by the Pleading of the Adverse Party.* — At common law it is said to be "express aider," when the opposite party supplies in his pleading some material fact omitted in the pleading to which he responds.¹ This rule obtains under the codes.² It has even been held that a *denial* of a fact not alleged supplied the omission of such allegation;³ but this is probably an unwarranted stretch of the rule.⁴

3. *Aider by Verdict.* — The common-law rule as to aider by verdict is stated thus: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict."

The doctrine of aider by verdict is of extensive application under the codes: —

1. In curing defective pleadings in which the allegations are too general, loose, ambiguous, or otherwise so defective as to be exposed to motion to make more definite and certain.⁵

¹ Chitty's Pl., Perkins' ed., 16 Am. ed. p. 703; Steph. on Pl. s. i. Rule i.

² *White v. Joy*, 13 N. Y. 83; *Kercheval v. King*, 44 Mo. 401; *Irwin v. Shaffer*, 9 Ohio St. 43; *Ferrera v. Parke* (Ore.) 23 Pac. 883; *Henry v. Sneed*, 99 Mo. 407, and see *Gulf, &c. v. Anderson*, 76 Tex. 194; *Shartle v. Minneapolis*, 17 Minn. 308; *Dayton v. Ins. Co.* 24 Ohio St. 345; *Garrett v. Trotter*, 65 N. C. 430; *Bate v. Graham*, 11 N. Y. 237; *Salazer v. Taylor*, 33 Pac. 369.

³ *Louisville Canal, &c. Co. v. Murphy*, 9 Bush (Ky.), 522, 529; *Grace v. Nesbit* (Mo.) 18 S. W. 1118.

⁴ *Scofield v. Whitelegge*, 49 N. Y. 259, 261.

⁵ *Quirk v. Clark*, 7 Mont. 231; *Johnson v. Mo. Pac. R. R. Co.* 96 Mo. 340; *Colchen v. Ninde*, 120 Ind. 88; *Peters v. Banta*, 120 Ind. 416; *Bonds v. Smith*, 106 N. C. 553; *Phillips' Code Pl.* § 287.

2. In supplying omitted allegations necessary to perfect a pleading, where the parties have proceeded and tried the cause as if such allegations had been duly inserted.¹

But while a defective statement of a cause of action may be cured by verdict, a defective cause of action cannot,² nor can the entire omission or absence of a material allegation be so cured.³

3. In supplying omitted pleadings, such as answer to amended complaint⁴ or reply⁵ where the parties had tried the issue as if such pleadings had been duly put in; or where the parties have tried the issue without pleadings.⁶

4. *Aider by Judgment.* — Substantially the same rules apply as to a pleading being aided by judgment as by verdict. In actions tried by the court, where no verdict is rendered, but a finding of facts and conclusions of law by the court is filed, and judgment thereon, the finding and judgment operate to cure defects in pleading in the same manner as the verdict does in the cases above cited.⁷ This doctrine, however, is fully embraced in the code provisions cited in the next sub-division of this paragraph.

5. *Errors in Pleading, etc., when disregarded.* — “The court shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.”⁸

¹ Fox v. Spring Lake Iron Co. 89 Mich. 387; Harkness v. McClain, 29 Pac. (Utah) 964; Brauns v. Glesige (Ind.), 29 N. E. 1061.

² Richards v. Trav. Ins. Co. 80 Cal. 505; Minor v. Rogers Coal Co. 25 Mo. App. 78.

³ Clement v. Hughes, 16 S. W. 358. See ante, § 171 a.

⁴ Gale v. Water Co. 14 Cal. 25.

⁵ McAllister v. Howell, 42 Ind. 15.

⁶ Lake v. Albert, 37 Minn. 453.

⁷ Ante, p. 302.

⁸ Code Ref. 315. For numerous decisions applying the salutary provisions of this statute, see the cases cited in the annotated codes.

SECTION VIII.

VARIANCE.

252. Variance defined. — It is a general and salutary rule of pleading that the allegations and the proofs adduced to support them must correspond. The object of pleading being to apprise the court and the adverse party of the facts of the case or defence, the strict rules of the common law regard a discrepancy between the allegations and the pleading and the proof as a variance. If the difference is upon a substantial point it is "a fatal variance,"¹ and the case or defence fails. The doctrine of variance, founded in the strict logic of pleading, made wreck of many meritorious actions and defences where the pleader had misconceived his facts or been disappointed in his proofs. Before the adoption of the codes, the rule had been mitigated in English practice,² which formerly was in a "disgraced state" on account of the rigid application of this doctrine.³

The codes, while not departing from the rule that the allegations and proofs must correspond, have so modified the common-law doctrine of variance as to apply it sensibly for the furtherance rather than the defeat of justice. There are three grades of discrepancy between allegations and proofs under the codes, each of which is treated according to its own nature, the paramount aim being to

¹ Steph. on Pl. 85.

² Stat. 3 and 4 William, c. 42; 9 Geo. 4, c. 15; Chitty's Pl., Perkins' ed., 16 Am. ed. p. 328.

³ Chitty's Pl. same ed. 328. For instances of the rigidity of the old system, see *Waters v. Mace*, 2 Barn. & Ald. 756; *Jones v. Mars*, 2 Campb. 305; *Jelf v. Oriol*, 4 Car. & P. 22; *Turner v. Hardy*, 9 Mees. & Welsby, 770; *Chanter v. Leese*, 5 Mees. & Welsby, 698; *Exon v. Russell*, 4 M. & Sel. 505.

accomplish a just adjudication of the real controversy on the merits.

253. The code rules as to variance are the following:

(1) An immaterial variance is one where the discrepancy is slight and so unimportant that the adverse party is not misled or prejudiced.¹ The court orders an immediate amendment without costs, or treats the pleading as though it were amended, letting in the evidence and giving it due weight. (2) A material variance, of the kind that would be fatal at common law, occurs where although the proof has relation to and connection with the averments of the pleading, yet the discrepancy is so great and is upon some substantial matter that the other party has been misled and will be prejudiced.² In such case the court in its discretion allows an amendment on such terms as may be just, and may grant continuance or otherwise to enable the aggrieved party the better to meet the case against him. (3) When there is a complete failure of proof, not in some particular or particulars only, but in the entire scope and meaning of the allegations, the proof wholly fails to make out the case. In such case no amendment is allowed. The case or defence then wholly fails for want of proof.³ A party cannot recover when he does not prove his case, nor can he allege one cause of action and at the trial prove another.⁴

254. Illustrative Instances. — For instances illustrative of variances held immaterial, consult cases cited in Bliss's Ann. N. Y. Code, 3d ed. vol. i. pp. 632-635; S. & B.'s Wis. An. Sts. §§ 2670-2671; Whittaker's Ohio An. Code.

¹ Code Ref. 261.

² Id. 262.

³ Id. 263.

⁴ *Dunn v. Durant*, 9 Daly, 391; *Beard v. Yates*, 2 Hun, 466; *Butler v. Livermore*, 52 Barb 570; *Eilert v. Oshkosh*, 14 Wis. 586.

§ 5295; Clark's N. C. Code, §§ 269, 270; and other statutes cited in the Code References.

For instances of variance held material and amendable, see same cases and statutes. McQuillan's Pl. & Pr. § 432, and Missouri cases cited.

For instances of failure of proof, examine above citations: Whitcomb v. Hungerford, 42 Barb. 177; De Graw v. Elmore, 50 N. Y. 1; Neudecker v. Kohlberg, 81 N. Y. 296; Dean v. Yates, 22 Ohio St. 388; Timmons v. Wiggins, 78 Ind. 297; Packard v. Snell, 35 Ia. 80; Faulkner v. Faulkner, 73 Mo. 327; Archibald v. Mut. Ins. Co. 38 Wis. 542; O'Brien v. St. Paul, 18 Minn. 176.

SECTION IX.

SUPPLEMENTAL PLEADINGS.

255. When Permitted. — Following the liberal course of equity pleading, the codes allow supplemental pleadings to be interposed by leave of the court. By the rules of equity pleading, as has been observed,¹ a supplemental bill could be filed in the cases specified in an earlier part of this volume. In the common-law system, matters occurring after the last continuance material to the defence could be pleaded *puis darreign* continuance. The supplemental pleadings of the codes are a substitute for the pleas *puis darreign* continuance of the common-law and the supplemental pleadings in equity.² By the codes it is generally provided that supplemental pleadings may be allowed by the court on motion, and on such terms as may be just. But the rule of the equity courts is somewhat narrowed in its application. While most of the

¹ *Ante*, p. 63, par. 52.

² *Holyoke v. Adams*, 59 N. Y. 235.

codes authorize the courts to allow supplemental pleadings alleging facts material to the case occurring after the former pleading was served,¹ only a part of them allow it to be made to allege facts of which the party was ignorant when he made his former pleading.² But as the same end can usually be attained by application for leave to amend, where some facts existing at the commencement of the action, of which the pleader was ignorant, ought to be alleged, the difference in the codes is of small practical importance.

256. The Supplemental Complaint.—It is to be noted: (1) that the supplemental complaint is not a substitute for the original, which still stands,³ but must allege facts material to the relief sought, and tend to show more conclusively the plaintiff's right to recover,⁴ hence: (2) It is not permissible to set up a new cause of action or claim; especially a new cause of action accruing since suit begun cannot be set up. The plaintiff cannot sue on an unripe cause of action and then help out his case by a supplemental complaint alleging that it has subsequently ripened,⁵ nor that he had since acquired title giving him right to sue.⁶ (3) It is allowed only on leave, and in the

¹ Code Ref. 306-307; *Goodacre v. Skinner*, 47 Kan. 575.

² Code Ref. 308.

³ *Dann v. Baker*, 12 How. Pr. 521; *Slauson v. Englehart*, 34 Barb. 198; *Watson v. Thibou*, 17 Abb. Pr. 184; *Wayne Pike Co. v. Hammons*, 27 N. E. 487; *Gibbon v. Dougherty*, 10 Ohio St. 365; *Nave v. Adams*, 107 Mo. 414.

⁴ *Watson v. Thibou*, *supra*; *Noonan v. Orton*, 21 Wis. 283; *West v. Burns*, 2 Law Bull. N. Y. 55.

⁵ *Tiffany v. Bowerman*, 2 Hun, 643; *Steinbarter v. Wolfstein*, 13 Ky. L. 871; *Farmers' L. & T. Co. v. Tel. Co.* 47 Hun, 315.

⁶ *Moon v. Johnson*, 14 S. C. 434; *Buckley v. Buckley*, 12 Nev. 423; *Bull v. Rothschild*, 16 Civ. Proc. (N. Y.) 356; *Loring v. Harris*, 12 Minn. 255.

discretion of the court, and upon such terms as may be just.¹

257. Supplemental Answers. — As the defendant ought to be allowed to make any defences to the action that may arise before the trial, great liberality is allowed, as well in supplemental answer² as in amendment.³ It is well settled that (1) the supplemental answer is a substitute for the plea *puis darreign* continuance of the common-law system;⁴ * and that it will be permitted to set up any matter of defence (but not counter-claim⁵) arising after the former answer; (2) that the supplemental answer must bring forward matter which is apparently a good defence;⁶ (3) that in many of the States, as has been noted, the supplemental answer may also present defences existing prior to suit brought, but of which the defendant was ignorant when he made his answer;⁷ (4) that it is discretionary with the court to allow supplemental answers,⁸ but that such answers ought to be let in when the

¹ Code Ref. 306; *Medbury v. Swan*, 46 N. Y. 200; *Holyoke v. Adams*, 59 N. Y. 233.

² *Bate v. Fellows*, 4 Bosw. 638; *Hoyt v. Sheldon*, 4 Abb. Pr. 59; *Radley v. Houghtaling*, 4 How. Pr. 251.

³ *Ante*, p. 278.

⁴ *Morel v. Garrelly*, 16 Abb. Pr. 269.

⁵ *Ante*, p. 256.

⁶ *Morel v. Garrelly*, *supra*; *Lyon v. Isett*, 42 How. Pr. 155; *Ratzer v. Ratzer*, 2 Abb. N. C. 461; *Palen v. Bushnell*, 18 Civ. Proc. (N. Y.) 56.

⁷ Code Ref. 318.

⁸ *Spear v. Mayor*, 72 N. Y. 442. In some cases supplemental answer may be filed of right. N. Y. Code, 544, as revised; *Gas-Works v. Standard Gas-Light Co.* 47 Hun, 255.

* NOTE. — But the supplemental answer is not like the plea *puis darreign*, a waiver of defences interposed in the former answer, 4 West. Law Jour. 1.

facts pleaded amount to an entire discharge of the action ;¹ (5) that the defendant will be denied leave to file and serve supplemental answer, if guilty of laches in applying for leave after the grounds of such answer arise or come to his knowledge ;² but the leave is so largely matter of discretion that the decisions on this point are far from uniform.³

258. The supplemental reply may be made, on leave, and on the like reason. The codes allow them on the same grounds that other pleadings are allowed.⁴ The reply can be supplemented only where some matter has arisen or come to knowledge since it was put in, to perfect or strengthen the plaintiff's defence to a counterclaim, or his response to new matter pleaded in the answer. A supplemental reply cannot be made to help out or supplement a weak complaint.

259. Leave to file Supplemental Pleading — How obtained. — When it is found necessary to file a supplemental pleading, the applicant prepares an affidavit setting forth the object of the action, and the condition of the cause, and the proceedings thus far had. The facts are then briefly stated which have subsequently occurred, or which have subsequently come to his knowledge, and his ignorance of them when the former pleading was made and served, and any facts necessary to be stated to show no laches or neglect on the part of the applicant. On this affidavit a motion is noticed or order to show cause ob-

¹ *Drought v. Curtis*, 8 How. Pr. 56.

² *Medbury v. Swan*, 46 N. Y. 200; *Barstow v. Hansen*, 2 Hun, 333; *McDonald v. Davis*, 12 Hun, 95.

³ *Drought v. Curtis*, 8 How. Pr. 56.

⁴ *Ormabee v. Brown*, 50 Barb. 436.

tained, and the motion heard. The court then grants leave to file the supplemental pleading.

The form of the pleading may be thus :—

FORM OF SUPPLEMENTAL PLEADING.

Title of Cause. } Supplemental Complaint (or Answer).

The above-named plaintiff (or defendant), by —, his attorney, in this his supplemental complaint (or answer), which is served under and pursuant to an order of the court, made herein, on the — day of — A. D. 18—, to which reference is hereby made, further alleges [*here state the matters essential to be supplementally pleaded*].

* *NOTE.*—Supplemental pleadings allowed in discretion, *Holyoke v. Adams*, 59 N. Y. 233, and will be refused where unnecessary (*Sage v. Mosher*, 17 How. Pr. 367), or where applicant is *guilty of laches* (*Hoyt v. Sheldon*, 19 N. Y. 207), or where it attempts to introduce a *new, independent substantive cause of action* growing out of later facts not affecting case made in first complaint (*Cohn v. Hussen*, 67 How. Pr. 461; *Bull v. Rothschild*, 4 N. Y. Supp. 826; *Hally v. Graf*, 29 Hun, 443), nor where the matter is *barred by the statute of limitations* (*Miller v. Johnson*, 10 Civ. Pro. R. 205); nor where the facts alleged are *inconsistent* with the original. *Slauson v. Englehart*, 34 Barb. 198.

It will be allowed where the subsequent facts *develop or extend the right of action* (*Haddow v. Lundy*, 59 N. Y. 320), as, in *replevin*, of sheep to allege increase and ask for damages for lambs and wool (*Buckley v. Buckley*, 12 Nev. 423), or where there is a *transfer of interest* in the subject of the action (*Diehl v. Lambart*, 9 Civ. Pro. R. 347; Code Ref. 317), or a *devolution of liability* (*Prouty v. Ry. Co.* 85 N. Y. 272); or where additional instalments fall due on the instrument sued upon (*B'k v. East Chester*, 44 Hun, 537).

While in some codes *newly-discovered facts* may be ground for supplemental pleading, the better course is usually to ask leave to amend the former pleading.

CHAPTER XIII.

OF CROSS-COMPLAINTS.

260. The Cross-Complaint. — As was mentioned in the introductory chapter of this volume, the defendant in a suit in equity must sometimes file a cross-bill, in cases where he seeks for himself some affirmative relief against the plaintiff, or other defendants, or both together,¹ or the plaintiff and persons not parties to the suit.

The ordinary counter-claim of the codes is applicable where the defendant desires some affirmative relief against the plaintiff, or some of the plaintiffs, between whom and himself a several judgment might be had, connected with the subject of the plaintiff's action, or arising out of the same transaction; but when the defendant desires relief against other defendants as well, or against the plaintiff and other persons not parties to the suit, the counter-claim of most of the codes is not available to afford him such relief.* The practice provided to meet such cases in the code States is as follows: —

¹ *Ante*, par. 54.

* **NOTE.** — The following instances will give an idea of the uses of the cross-complaint: A sued B on a note made by B. In the action B filed a cross-complaint alleging that one C was the real party in interest, and A merely his agent; that C had received with the note property as security from which he had realized more than enough to pay the amount of the note, and prayed that C might be made a party and required to account and pay over the surplus, etc., received from the property delivered as security. *Marriott v. Clise*, 12 Colo. 561. In a

1. A few States (Arkansas, California, Idaho, Kentucky, Ohio, and Wisconsin) allow a cross-complaint.^{1*}

¹ Code Ref. 127.

foreclosure suit one defendant filed a cross-complaint alleging that he was an owner of an undivided half of the mortgaged premises, and had executed the mortgage merely as surety for the owner of the other half; that the latter had conveyed his interest in the premises to a third person, who had agreed to pay the mortgage, and praying that the third party be made defendant and his interest in the land be ordered first sold; and this was held a proper case for filing a cross-complaint. *Chaplin v. Baker* (Ind.), 24 N. E. 233. In an action by part of the heirs of a deceased owner of real estate against the other heirs for a partition of the real estate descended to them, one of the heirs alleges in a cross-complaint that the ancestor, for love and affection and in consideration of money, agreed to convey the real estate in question to him, and had put him in possession, under such agreement; and he prayed specific performance, as against all the other parties, of the agreement of the ancestor. *Held*, a good cross-complaint. *Winslow v. Winslow*, 52 Ind. 8. In an action for trespass on E. lode one defendant filed a cross-complaint to have the title to E. lode quieted, alleging that the plaintiff had set up an adverse claim to part of E. lode, and was asserting the same by the original action. This was held a proper cross-complaint. *Bullion, etc. Co. v. Eureka, etc. Co.* 5 Utah, 3.

* NOTE. — The occasions when this may be done are not stated alike in all the States above named. In California and Idaho the cross-complaint may be filed "whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which it relates" (Code Cal. § 442; Idaho R. S. 1887, § 4188). In Ohio the cross-petition is made in the answer, and constitutes a case for affirmative relief. There it seems to embrace the counter-claim of the other States. In Kentucky the cross-petition is defined to be "the commencement of an action by a defendant against a co-defendant, or a person who is not a party to the action, or against both, or by a plaintiff against a co-plaintiff, or against a person who is not a party to the action or against both; and it is not allowed to a defendant, except upon a cause of action which affects or is affected by the original cause of action; nor to a plaintiff, except upon a cause of

2. In several States (Arkansas, Connecticut, Iowa, Kansas, Nebraska, and Wyoming) the defendant can plead a counter-claim; and if it render necessary the bringing in of new parties, they may be brought in.¹ So, in Missouri.²

3. In New York the cross-complaint by that name is not in use, but its purpose is accomplished, (a) by serving on co-defendant an answer that seeks determination of ultimate rights as between the parties to the action; (b) by bringing in new parties, where the relief sought by a defendant renders their presence in the action necessary.³

4. In Indiana, the cross-complaint is in use, though the code is silent on the subject.⁴

The cause of action, on which the cross-complaint is grounded, must be one arising out of or having reference to the subject-matter of the plaintiff's action, and not relate to other and distinct matters.⁵

¹ Code Ref. 172, 84, 86.

² *Tucker v. S. & L. Ins. Co.* 63 Mo. 458. Cross-bills may be filed by attaching creditors, when. *Roland v. Ross*, 120 Mo. 128.

³ *Bliss' Ann. Code*, § 521.

⁴ *Fletcher v. Holmes*, 25 Ind. 458; *Woolen's Dig.* p. 1267.

⁵ *Harrison v. McCormick*, 69 Cal. 16. See 1 Wall. 14; 30 Ark. 249.

action which affects, or is affected by, a set-off or counter-claim" (Code '88, § 96). In Arkansas the statute is: "The defendant may file a cross-complaint against persons other than the plaintiff and have proceedings thereon, as follows: first, when a defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject-matter of the action, he may make his answer a cross-complaint against the co-defendant or other person." The residue of the section relates to practice (Ark. Dig. 1884, § 5033). In Iowa the statute is: "When the defendant has a cause of action affecting the subject-matter of the action against a co-defendant, or a person not a party to the action, he may, in the same action, file a cross-petition" (McClain's An. Sta. § 3869).

4. In a few States, it appears that the cross-complaint is used in all cases where the defendant seeks to obtain affirmative relief against the plaintiff, thus making it do the office of "the counter-claim."¹

5. Where the cross-complaint is allowed, it serves also the purpose of the cross-bill in equity, to bring before the Court a question arising between two or more defendants in the same action² relating to the subject-matter in litigation. The equity rule rests on the doctrine that the defendant has a right to insist that he shall not be obliged to institute another suit for the same matter that may then be adjusted between the defendants.³ When his right to such relief appears upon the pleadings, and from the proofs taken between the plaintiff and the defendants, he is entitled to such adjustment in the judgment, without filing a cross-complaint;⁴ but when such facts as give him a right to some relief as against a co-defendant, are not provable upon the issues joined by the ordinary pleadings between plaintiff and defendants, the defendant must file his cross-complaint against the co-defendant, stating his cause of action relating to the subject-matter of the plaintiff's suit.⁵

¹ Ohio, § 5059; *Wright v. Bacheller*, 16 Kan. 259.

² Story's Eq. Pl. § 392.

³ *Chamley v. Dunsany*, 2 Sch. & Lefr. 710, 718.

⁴ *Elliott v. Pell*, 1 Paige, Ch. 263.

⁵ *Fletcher v. Holmes*, 25 Ind. 465; *Tucker v. St. Louis Ins. Co.* 63 Mo. 588. Under the Ohio Code (§ 5059) the answer which prays affirmative relief may be deemed a cross-petition; and where such relief is prayed against a co-defendant, he may demur or answer, and his pleading may be met by demurrer or reply, as the case may require. The same provisions are found in the Code of Kansas (§§ 4177, 4187). In Wyoming, the Code also provides that an answer containing prayer for affirmative relief may be styled a cross-petition (§ 2447), and allows a defendant in such answer to pray relief against a co-defendant (§ 2447), following in this respect the Ohio Code (§ 5071). The effect of this is to incorporate the cross-complaint into the same pleading that contains the answer to the plaintiff's cause of action.

CHAPTER XIV.

OF PLEADINGS IN EXTRAORDINARY REMEDIES.

261. Extraordinary Remedies at Common Law. — In addition to the remedies afforded by the ordinary common-law actions mentioned in the introductory chapter of this volume, there were others in the common-law courts so exceptional and peculiar in their nature as to be regarded as *extraordinary remedies*. They were not properly actions, but were special proceedings, having generally a procedure and course of pleading somewhat different from that of ordinary actions. The most important and most frequently invoked of these were *Mandamus*, *Quo Warranto*, *Prohibition*, and *Habeas Corpus*. They are mentioned here only in the most general way, merely to note the methods of pleading in them as it obtains under the several codes of procedure.

262. Mandamus. — The writ of mandamus (we command you) was in English law a high prerogative writ, issued in the king's name out of King's Bench in the exercise of supervisory jurisdiction, directed to some person, corporation, inferior court or officer, requiring them to do some particular thing appertaining to their office or duty, which the court had previously determined, or at least supposed to be consonant with right and justice, where a party had no other readily available remedy.¹

¹ 3 Blackst. 111; U. S. v. Macon County, 99 U. S. 582; *Stewart v. Police Jury*, etc. 116 U. S. 135; *People v. Met. Pol. B'd*, 26 N. Y. 316; *Gilman v. Bassett*, 33 Conn. 298.

In American law, mandamus, where invoked in behalf of private right, is deemed not a prerogative writ, but as in the nature of a private action,¹ and more properly a writ of right.²

263. In whose Name Proceedings in Mandamus are had.—The codes are not uniform in prescribing in whose name the proceedings for a writ of mandamus shall be brought.

1. In part of the States, the proceeding, where a private right only is involved, is in the name of the person beneficially interested.³

2. In some States, the writ is sued out in the name of the State upon the relation of the person beneficially interested,⁴ and the title of the action then is, "The State of —, upon the relation of (*ex rel.*) *v.* (*name of defendant.*)"

3. Where the duty of which performance is sought to be compelled is in behalf of the public, and not for mere private benefit, the proceeding is prosecuted in the name of the State in all jurisdictions, and usually by the attorney-general or other public prosecuting officer, but may be prosecuted upon the relation of and by a private person.⁵

264. Pleadings in Mandamus.—The practice in olden time was for a petition or sworn suggestion to be filed

¹ Kendall *v.* U. S. 12 Pet. 527; Commonwealth *v.* Dennison, 24 How. 66.

² High's Ex. Rem. §§ 3, 4.

³ Ariz. § 2336; Ark. § 4569; Cal. § 367; Colo. § 308; Idaho, § 4978; Ind. § 1169; Iowa, § 4613; Kan. § 4806; Ky. § 474; N. Car. § 622; Okla. § 5064; Ore. § 5941; Utah, § 3731.

⁴ Conn. § 1294; Iowa, § 5191; Minn. § 5279; Mo. § 6811; Mont. § 567; Neb. § 5191; Nev. § 3470; N. Y. § 2088; Ohio, § 6743; S. Car. § 2343; Wash. § 737; Wis. § 3450; Wyo. § 3075.

⁵ Un. Pac. R. R. Co. *v.* Hall, 91 U. S. 343; Dillon on Mun. Corp. 4th ed. § 865 and notes.

which set forth with great strictness and technical nicety the facts, which, if true, would entitle the applicant to the writ. An alternative writ then issued, commanding the person, officer, or court to whom the writ was sent to do the act sought to be compelled, or show cause to the court at a time stated why he did not do so. The facts were fully stated in this writ, and it became in effect the declaration in the case. The person, etc., to whom the writ was directed then made a return, which was in the nature of a plea to the writ, in which he might traverse or confess and avoid the facts stated in the writ. Formerly the return was taken to be true, and the case was tried on the alternative writ and return. If the return was in fact untrue, the remedy of the other party was for a false return. This evil in practice was remedied by the Statute of 9 Ann. c. 20, which allowed the party suing the writ to plead to or traverse all the material facts set out in the return, to which the party making the return might reply, take issue, or demur.

The Statute of 9 Ann. forms the basis of the procedure in most of the American States. The codes are widely variant; but the course of pleading is in all of them, under different names, substantially the same.

1. A sworn statement—in some States by affidavit,¹ in others by petition² or other sworn paper³—is filed by or in behalf of the person suing out the writ, who is

¹ By affidavit and motion in Arizona (§ 2336); Ark. (§ 4571); Cal. (§ 1086); Idaho (§ 4978); Ind. (§ 1169); Kan. (§ 4808); Mont. (§ 567); Nev. (§ 3470); N. Y. (§ 2067); S. Dak. (§ 5518); N. Dak. (§ 5518); Utah (§ 3731); Wash. (§ 737).

² By petition in Colo. (§ 308); Conn. (§§ 905, 1294); Iowa (§ 4614); Ky. (§ 474); Mo. (§ 2116); Ohio (§ 6743); Okla. (§ 5064); Ore. (§ 594); Wis. (*State ex rel. v. Baard*, 64 Wis. 218); Wyo. (§ 3075).

³ In South Carolina, as at common law, by petition (§ 452). In Neb. by relation (§ 5191). In Minn. by information (§ 5279). In N. Y. by affidavit or other written proof (§ 2067).

usually called the relator, suing in the name of the State, in which statement is set forth, according to the general rules of pleading, all the facts going to show the party entitled to the writ.¹

2. On such statement, (a) in some jurisdictions a motion is made that the writ be granted; (b) in others, an order to show cause is issued, requiring the party against whom the writ is sought to show cause to the court why it should not be granted; in others, (c) an alternative writ is issued, commanding the person, officer, or court to do the act or show cause to the court why it is not done. Where an alternative writ is issued, it contains a statement of all the material facts constituting the grievance.

3. When the initial step is by affidavit and motion, or by order to show cause, the party defendant opposes the motion by affidavit or other form of traverse or matter in confession and avoidance, or by objection in the nature of a demurrer that no sufficient grounds for issuing the writ are stated.

4. If the alternative writ is issued, it contains a statement of all the facts relied upon as grounds for the writ; and the party against whom the writ is sought may, as he is advised, in some jurisdictions, demur to the writ;² in others, move to quash,³ or dismiss for insufficiency; or if these modes of attack are not advisable, he must make return to the alternative writ. The return to the writ is in the nature of a pleading, and all the general rules of statement apply in judging of its sufficiency.⁴

5. To the return, the opposite party may demur, or traverse it, or set up new matter operating by way of confession and avoidance.

¹ *State v. Everett*, 52 Mo. 89; *People v. Hilliard*, 29 Ill. 418.

² *People v. Mayor*, 51 Ill. 28; *People v. Hilliard*, 29 Ill. 418.

³ *Everett v. People*, 1 Caines (N. Y.), 8.

⁴ *State ex rel. v. Jennings*, 56 Wis. 113; *High on Ex. Rem.* 2d ed. § 466.

6. The party making the return may also, by way of rejoinder, demur or traverse, or plead new matter in avoidance, and so on until an issue is reached.¹

7. In some code States, the pleadings are regulated by the code system.²

8. In a few States, the course of pleading is to deem defensive new matter, in any pleading after the first, controverted according to the code principle, without further replicatory pleading.³

9. In a small number of States, the only pleadings recognized as such are the alternative writ and return.^{4 *}

265. What the Petition or Relation should contain. — The petition or relation for a writ of mandamus, which must constitute the foundation for the statements in the alternative writ, must be framed in accordance with the general rules of pleading. It must contain : —

1. A statement of facts, showing (a) that the defendant (usually called the respondent) is an officer, and what the office is; (b) that he is charged with a duty in the premises growing out of the facts and circumstances which are stated; ⁵ (c) that it is a *ministerial* duty; that is, a duty which the law requires him to do in view of the facts

¹ In Kansas (§ 4810) and Nebraska (§ 5203) the alternative writ and return constitute the only pleadings in the proceeding.

² In North Carolina the proceeding is begun by summons and complaint (§ 622). In Iowa the pleadings are as in ordinary actions (§ 4615).

³ In N. Y. an issue of fact arises upon a denial in a return, or upon a material allegation of new matter in the return, unless demurred to (N. Y. Co. Proc. § 2079).

⁴ Kan. § 4808; Neb. § 5791.

⁵ *State v. Hundhausen*, 24 Wis. 196.

* NOTE. — For forms of the several pleadings in mandamus, see 2 Abbott's Forms, p. 736; 1 Bates' Pleadings, pp. 553-555; Bryant's Wis. Code Forms, p. 259; 2 R. S. Mo. p. 2277.

stated, and not one that he is clothed with discretion to do or not do, as he deems proper; (*d*) that there is no other adequate remedy.¹ An allegation of this kind is not necessary nor is it proper pleading, but it must be made apparent from the facts stated that there is no other remedy available;² (*e*) that it is possible for the officer to perform the duty sought to be commanded;³ that everything precedent to the right to have the duty performed has been done,⁴ and that the duty has not been performed;⁵ (*f*) that the relator is entitled to have it performed, or that if he appears for or in behalf of a public corporation, he has been directed to appear and prosecute;⁶ (*g*) that there has been a distinct, unconditional demand and refusal to perform the duty;⁷ but in cases where the duty is to the public, demand need not be made or alleged, as the law itself is a demand.⁸

2. A demand or prayer for the writ, specifying accurately what is to be commanded by it.⁹

266. Quo Warranto.—Anciently, the writ of *quo warranto* was a high prerogative writ, issued in the exercise of the king's prerogatives against:—

1. One who usurped or claimed any office.
2. One who usurped any franchise or liberty of the Crown.

¹ *People v. Hilliard*, 29 Id. 418.

² *Territory v. Shearer*, 2 Dak. 332.

³ *State v. Warner*, 55 Wis. 271; *Williams v. Co. Comm'rs*, 35 Me. 345; *People v. Sup'rs*, 15 Barb. 607.

⁴ 2 Dillon on Mun. Corp., § 866 (696) and note.

⁵ *State v. Palmer*, 10 Neb. 203.

⁶ *High's Ex. Rem.* 2d ed. §§ 13, 41, 377 b.

⁷ *Oroville, &c. R. R. Co. v. Sup'rs*, 37 Cal. 354; *Chace v. Temple*, 1 Iowa, 179; *Maconpin Co. Court v. People*, 58 Ill. 191.

⁸ *State v. Marshall Co. Judge*, 7 Ia. 186; *Com'w'lt v. Comm'rs Allegheny Co.* 37 Pa. St. 237; *People v. B'd Education*, 127 Ill. 613.

⁹ *State v. Union Committee*, 43 N. J. L. 518.

3. One who had forfeited any franchise by misuser or non-user; that is, by exercising a power or privilege in excess of (*ultra vires*) the franchise, or by failing to exercise the powers and privileges conferred upon him; such failure or non-user being to the detriment of the public.

Abuses of this writ in early times by justices in eyre and by the king's commissioners, sent out to administer his prerogative powers, led to various statutes, not material to our present inquiry. The inefficacy of the writ to prevent all usurpations, and the fact that it was merely a civil remedy, and the proceedings upon it quite dilatory, led to the adoption of a proceeding both civil and criminal in its nature, called "an information in the nature of a *quo warranto*;" and in this the judgment could be for ouster or expulsion from the office or for seizure of the usurped or forfeited franchise into the king's hands, and also for a fine imposed for the wrongful doing.

For a long time after this remedy had been adopted, it could be instituted only by the law officer of the Crown; and individuals, who were wronged by the usurpation, had no remedy save when it pleased the king's attorney-general to prosecute, on the ground that there had been encroachment on the prerogative of the Crown.

This condition of things led to the Statute of 9 Ann. ch. 20, passed in 1710, the principal features of which were:—

1. That, on leave of the courts, the proceeding by information in the nature of *quo warranto* might be prosecuted on the relation, that is, the complaint, of any private person, whose right was affected by the usurpation.

2. That the right of the relator, as well as that of the alleged usurper or intruder into the office, might be determined in the proceeding.

3. That judgment might be (a) of ouster of the usurper,

(b) for fine by way of punishment for the intrusion, (c) and that the relator recover his costs.

The Statute of 9 Ann., being formerly in force in the American Colonies, became the basis of procedure here. In the code States, there is much diversity in minor details of name and form of procedure, but all contain substantially the following provisions, with some exceptions mentioned in the subjoined note:—

1. The action may be prosecuted by the one who claims the office which another has intruded into or usurped.

2. The right of the relator, or complainant, may be adjudged as well as the right of the alleged intruder or usurper.

3. Judgment may be given (a) of ouster; (b) for fine; (c) that the relator recover his costs; (d) and in some States that the relator recover his damages for the intrusion, whereby he lost the emoluments and perquisites of the office.¹

267. In whose Name the Proceeding in the Nature of a Quo Warranto should be brought.—The proceedings, under the Statute of 9 Ann., were brought in the name of the king upon the relation (*ex relatione*) of the person

¹ Judgment for ouster, relator's right, and his costs, but no fine. Ark. Sts. (1884), §§ 6470, 6471; (Ind. Myers' R. S. 1888), §§ 1131-1139; Ky. (Carroll's Co. 1888), §§ 480-488; Neb. (Cobbey's Com. Sts.) §§ 5328-5262; Nev. (Bailey & Ham. Sts. 1886), §§ 3711-3737; Ohio Code, §§ 6760-6793; Okla. Sts. (1889), §§ 5027-5039; Wash. (Hill's Sts. & Co. 1891), §§ 679-689. In the following code States a fine can be imposed on the intruder: Cal. (Deering's An. Co. & Sts.), §§ 803, 809; Colo. (Rice's Co.) §§ 289-295; Conn. as at common law; Idaho Sts. (1887) §§ 4612-4614; Minn. (Kelly's Sts. 1891) §§ 5333-5343; Mo. (R. S. 1889) §§ 7390-7395; Mont. (Comp. Sts. 1887) §§ 411-417; N. Y. Co. Proc. §§ 1948-1949; N. C. (Clark's Co.) §§ 603-610; N. Dak. (Sta. Dak.) §§ 5345-5361; Oreg. (Hill's An. L. 1887) §§ 357-368, S. C. Co. §§ 424-443; S. D. (Sta. Dak.) §§ 5345-5361; Wis. (R. S. 1878) §§ 3463-3475, Wyo. (P. S. 1887) §§ 3092-3111.

prosecuting, called "the relator." In the American States, under the common-law practice, the proceeding is generally brought in the name of the State, thus: "The State of — *ex rel.* (upon the relation of) of A B v. C D." Under the codes of the States adopting a reformed procedure are found several modes of bringing and entitling the proceeding, viz.: —

1. In some States the proceeding, in the case of State offices, is brought upon an information, by the Attorney-General, in the name of the State, upon the relation or complaint of the relator.

2. In some States the action can be brought by the relator in the name of the State, when the attorney-general or prosecuting officer will not bring it.

3. In several States the action is brought in the name of the State, and the claimant is joined as co-plaintiff.

4. In some States the relator may sue as in an ordinary action in his own name.*

* NOTE. — In Arkansas (§ 6466), by information in nature of *quo warranto*, and State or party entitled to office or franchise sues. In other than county offices, State sues by attorney-general (§ 6468). In California (§ 803), action in name of the people of the State by attorney-general on his information or upon complaint of private party. In Colorado (§ 289), same as in California; and if attorney-general refuses or neglects to sue, private party may. In Connecticut, the proceedings are as at common law, by information in nature of *quo warranto* (§§ 1300-1303), on relation of private party, who recovers costs. In Idaho (§ 4611), in name of people of State by district attorney in case of county, city, or precinct franchises; by attorney-general where it relates to State offices or franchises. Any person entitled to the office or franchise may sue in his own name. In Indiana (§ 1132), by prosecuting attorney upon his own relation, when he deems proper or is directed by the court. Any person claiming an interest may bring the information on his own relation. In Iowa (§§ 4581-4584), by district attorney when directed by governor, legislature, or court, or when he deems proper. If he neglect or refuse, private party — any citizen — may obtain leave of court to sue in name of State. In Kansas, by

267 a. The Pleadings in Quo Warranto. — The rules of pleading which govern in civil actions are generally ap-

attorney-general or county attorney in name of State, or where private person claims interest adverse to defendant, such private person may sue in his own name at his own expense (§ 4768). In Kentucky, actions to repeal charters are brought in name of Commonwealth (§ 481); actions to oust usurpers in county offices are brought by private persons; in other offices, by attorney-general (§ 485). In Minnesota (§ 5333), by information in name of State, by attorney-general, or upon complaint of private party, who may be joined with State as plaintiff (§ 5336). In Missouri, by information in nature of *quo warranto*, by attorney-general or prosecuting attorney (§ 7390), relator's name to be in information. In Montana, by action in name of the people of the State, by attorney-general, upon his own information or complaint of private party (§ 411). If he neglect or refuse, the private party may bring action in the name of the people. In Nebraska, by information, by prosecuting attorney, when he deems proper or is directed by governor, legislature, or the court (§§ 5238-5240). In Nevada, same as Nebraska (§§ 3711-3713). In New York, the attorney-general brings the action upon his own information, or the complaint of a private person (§ 1948). The relator or person entitled may have his interest stated in the complaint, may have order of arrest, and recover the office (§§ 1949-1951). In North Carolina, to annul a corporation, &c., action is brought by attorney-general in name of State (§ 605); to oust usurper in office action is brought by attorney-general in name of State, on his own information or the complaint of a private party, or attorney-general may grant leave to private party to sue in name of State (§§ 607-608), and defendant may be arrested as in New York (§ 609). In North Dakota, action is brought by district attorney, in name of State on leave granted by court, against corporation (§ 5346), and in same manner, on attorney's own information or complaint of private party, in case of usurpation or forfeiture of office (Sta. Dak. §§ 5346-5361). In Ohio, a civil action is brought by attorney-general in name of State (§§ 6760-6764); private party may sue when entitled to the office (§ 6764). In Oklahoma (§ 5027), substantially as in Indiana. In Oregon, by action at law in name of State against corporation, when governor directs or court grants leave (§ 355); in case of usurpation of office, by action at law in name of State by prosecuting attorney or upon relation of a private party (§ 357). In South Carolina, an action is brought by attorney-general in name of State against corporations (§§ 425-426); for usurping an office it is

plicable to the pleadings in the action or proceeding of *quo warranto*, notwithstanding it has some of the incidents of a criminal prosecution.¹ This is universally true of the code substitute for the writ of *quo warranto*. The information, relation, or complaint, as it is variously called, is the first pleading on behalf of the prosecution, and is tested as to its sufficiency by the same general rules applied in ordinary civil actions. A few general suggestions only can here be given as to the framing of this pleading.

The Answer or Plea in Quo Warranto. — The general rule is that the defendant must disclaim the office or franchise, or he must justify. He cannot merely plead not guilty or *non usurpavit* (that he has not usurped).² He is called upon to show by what warrant (*quo warranto*) he

¹ High's Ex. Rem. § 710.

² Reg. v. Blagden, 10 Mod. 296; People v. Mayworm, 5 Mich. 146; State ex rel. v. Foote, 11 Wis. 14.

brought by attorney-general in name of State, or by private party on leave granted in court (§ 428). In South Dakota, same as in North Dakota. In Utah, the purposes of *quo warranto* are accomplished by a writ of mandate (§ 3529), or by a proceeding for contesting an election (§§ 3750-3766, amended by ch. 46, Laws of 1890). In Washington, by prosecuting officer on his own information when he deems it his duty or is ordered to do so by court or other authority, or it may be brought by claimant on his own relation (§§ 679-680). In Wisconsin, by information in nature of *quo warranto*, in the Supreme Court, which has original jurisdiction in *quo warranto*, and still adheres to common-law procedure (§ 3463); action of *quo warranto* in the name of the State, upon information by attorney-general, or upon complaint of private party may be brought in circuit courts, and the claimant joined with State as plaintiff (§§ 3465-3466). In Wyoming, by civil action in name of State by prosecuting officer, in his discretion, or when ordered (§§ 3092-3095), or by private party claiming office on his giving security (§ 3096).

holds the office; and the answer or plea must show a good title in himself¹ to the office or franchise.

The Information, Relation, or Complaint. — 1. When an information is filed by the attorney-general it is usually begun and concluded in these or similar words: —

Title of Cause, as above given. }

A B, Attorney-General of the State of —, who sues for the said State in this behalf, upon the relation of C D, comes into the — court, here, before the judge [s] thereof, on this — day of —, A. D. 18—, and gives the court to understand and be informed that [*here state the facts constituting the cause of action, and conclude with prayer for judgment*]. Wherefore the said Attorney-General, upon the relation of said relator, demands judgment.

1. That [*here indicate the judgment prayed for, whether of ouster from office, forfeiture of charter, annulment of franchise, as the case may be*].

2. That said relator have and recover his costs herein,

3. And for such further judgment as may be proper in the premises.²

— — —,
Attorney-General.

2. In case of usurpation of a franchise, facts must be alleged from which it can be inferred, as a legal conclusion, that there is an usurpation. It has been held sufficient to allege that the defendant is exercising the functions of a corporation without being incorporated.³

3. Where an office has been usurped, the facts showing the usurpation or intrusion into the office must be alleged. The allegation that the defendant intruded into, usurped,

¹ *People v. Utica Ins. Co.* 15 Johns. 357; *People v. Thatcher*, 55 N. Y. 525; *Barnum v. Gilman*, 27 Minn. 466; *State v. McCann*, 88 Me. 386; *Larke v. Crawford*, 28 Mich. 88.

² See Maxwell's Code Pl. p. 285, for frame of form.

³ *People v. Riverside*, 66 Cal. 288.

and is exercising the functions of the office is held sufficient on demurrer.¹

4. When the relator claims an interest in the office or franchise, the information, relation, or complaint must name him and set forth what his interest is.² This is for the purpose of having his right adjudged.³ But if the information shows a usurpation on the part of the defendant, it will not be demurrable for failing to show a right on the part of the relator.⁴

5. When the relator claims to have been elected to an office, and that the defendant, as another candidate for the same office, has entered into and unlawfully usurped it, the relator usually avers—(a) that at the election in question the whole number of votes cast was a certain number; (b) that the relator received a certain number of the votes legally cast, which must show him as receiving a plurality or majority, as the law may be, which entitles him to the election; (c) that the defendant received a certain number, which must appear to be less than the votes received by the relator.⁵ If illegal votes have been counted for the defendant, it is the better course to allege in what the illegality consisted. Especially is this necessary when

¹ *State ex rel. v. Dahl*, 65 Wis. 510, 518; *People v. Carpenter*, 24 N. Y. 86.

² See sections of codes above cited in note on p. 323.

³ *State v. Heinmiller*, 30 Ohio St. 101.

⁴ *People v. McIntyre*, 10 Mont. 166; 25 Pac. 100. Otherwise held in Indiana. *State v. Bieler*, 87 Ind. 320; *State v. Long*, 90 Ind. 351. In Wisconsin, the relator recovers costs though he fail to show his right if the defendant is an usurper. *State v. Jenkins*, 46 Wis. 616.

⁵ In Wisconsin, where the defendant has received a certificate of election, it is necessary to allege in the information or complaint—(a) the number of legal votes cast; (b) the number cast for the relator; (c) the number cast for the defendant; (d) the names of the persons who voted illegally for the defendant, if illegal votes have been counted for him; and (e) in what the illegality consisted (R. S. § 3468).

it is alleged that the votes or any of them counted for defendant were illegal.¹

268. The Writ of Prohibition is an extraordinary judicial writ issuing out of a superior court to an inferior court or the judge thereof, and the parties to some suit, action, or judicial proceeding therein, commanding the court not to hold, and the parties not to prosecute the action, suit, or proceeding further.

When it issues.—The writ issues when —(1) The court below is entertaining a cause or matter not within its jurisdiction; ² (2) The court below is proceeding where it has jurisdiction, but in an unauthorized manner,³ in excess of jurisdiction; (3) The proceeding in the inferior court would defeat a legal right.⁴

When it will not issue.—The writ of prohibition, being a writ to prohibit proceedings of a *judicial* nature and to prevent the exercise of usurped judicial power, will not issue — (1) When the court or inferior tribunal is acting in an *administrative* capacity merely, and not judicially; ⁵ (2) Before the suit or proceeding is begun, and is only threatened to be brought; ⁶ (3) After the final disposition of it in the inferior court; ⁷ (4) To perform the

¹ R. S. Wis. § 3468; *Collins v. Huff*, 63 Ga. 207; *Atty.-Gen. v. Page*, 38 Mich. 286.

² 3 Blackst. 112.

³ *Quimbo Appo v. People*, 20 N. Y. 531; *Roper v. Cady*, 4 Mc. App. 593; *Coker v. Superior Court*, 58 Cal. 177.

⁴ 2 Chitty's Pr. 355.

⁵ *Thomas v. Tracy*, 60 N. Y. 31; *Norton v. Dowling*, 46 How. Pr. 7; *State v. Clark Co. Court*, 41 Mo. 44; *State ex rel. v. Kellogg*, 31 Wis. 93; *La Croix v. Fairfield Co. Comm'rs*, 50 Conn. 321; *Spring Valley Water Works v. Bartlett*, 63 Cal. 245.

⁶ *Prignitz v. Fischer*, 4 Minn. 366.

⁷ *United States v. Hoffman*, 4 Wall. 158; *Dayton v. Paine*, 13 Minn. 493; *People v. Excise Comm'rs*, 61 How. Pr. 514.

function of a writ of error,¹ or *certiorari*,² or *quo warranto*;³ (5) When the applicant has other adequate remedy.⁴

269. Pleadings in Prohibition.—The proceedings in most of the code States for obtaining the writ are very simple. The applicant or person beneficially interested in obtaining the writ files in some States a petition,⁵ in others an affidavit,⁶ setting forth the facts on which the writ is sought.

What the Affidavit or Petition must contain.—The affidavit or petition for the writ should contain, according to the facts and circumstances of the case—(1) A statement of the action, suit, or proceeding, showing that it is brought and prosecuted in a court, over which the court applied to has supervisory jurisdiction, the name of the court, and that it is one having judicial power, and the nature of the proceeding sought to be prohibited, to show that judicial power is being exercised in respect to it; (2) Facts showing that the inferior court is acting without or in excess of its jurisdiction; (3) The grounds or sources

¹ *Shell v. Cousins*, 77 Va. 327.

² *Smith v. Whitney*, 116 U. S. 167; *Ex parte Gordon*, 104 U. S. 515.

³ *Brickner v. Veuve*, 63 Cal. 304; *State ex rel. v. McMartin*, 42 Minn. 30.

⁴ *Russell v. Jacoway*, 33 Ark. 191.

⁵ Petition in Ark. (§ 4571); Missouri (2 R. S. 1889, p. 2277); Kentucky (Carroll's Code, § 474).

⁶ Affidavit in Cal. (§ 1103); Colo. (§ 298); Idaho (§ 4994); Ind. (§ 1169); Minn. (§ 5291); Mont. (§ 580); N. Y. (§ 2091); North Dak. (§ 5530); Okla. (§ 5061); South Dak. (§ 5530); Utah (§ 3744); Wash. (§ 737); Wis. (§ 3457). In Ohio, Oregon, Iowa, Kansas, Nebraska, Nevada, and Wyoming, there are no statutory provisions as to the writ of prohibition. Its purposes seem to be accomplished by enlarging the functions of mandamus and other writs. In Connecticut, North Carolina, and South Carolina, the common-law procedure remains unchanged.

of the petitioner's knowledge, information, or belief, unless he is able to allege positively upon his own knowledge ;¹ (4) Facts showing that motion to dismiss,² or plea to the jurisdiction,³ or demurrer, or some other objection to the jurisdiction of the inferior court has been made and overruled,⁴ unless from the facts stated it may be inferred or presumed that the inferior court has passed on the question of jurisdiction ;⁵ (5) Facts, if not already appearing, showing that the petitioner has no other remedy. This must be made to appear as a legal conclusion from the case as stated ; (6) The petition or affidavit may close with the appropriate prayer for relief, and for general relief.⁶

¹ *Cariaga v. Dryden*, 30 Cal. 244.

² *Chester v. Colby*, 52 Cal. 516 ; *State v. Williams*, 48 Ark. 227.

³ *Ex parte McMeachem*, 12 Ark. 70 ; *Arnold v. Shields*, 5 Dana (Ky.), 18.

⁴ *Ex parte McMeachem*, 12 Ark. 70 ; *Hanger v. Keating*, 26 Ark. 51 ; *Barnes v. Gollschalk*, 3 Mo. App. 222 ; *Havemeyer v. San Francisco Superior Court*, 84 Cal. 327.

⁵ *State v. Wilcox*, 24 Minn. 143.

⁶ Forms for petition or affidavit for writ of prohibition may be found in 1 Abbott's New Practice and Forms, p. 818 ; Bryant's Wis. Code Forms, p. 264.

CHAPTER XV.

PRACTICAL SUGGESTIONS IN PLEADING.

SECTION I.

OF THE FRAMING OF COMPLAINTS.

270. Preparation for Drawing the Complaint. — The space allotted in this volume does not permit consideration of all the details of pleading, nor much in the way of example. In addition to the rules and code provisions hereinbefore given, a few practical suggestions as to manner and form of statement may be of value to the student.

The requisites to good pleading are, —

1. A correct knowledge of the substantive law applicable to the particular case.
2. A clear understanding of the remedial law applicable to it.
3. A knowledge of the evidentiary facts by which the case must be supported or resisted.
4. A clearly defined theory of the nature of the action to be brought and the relief to be sought by it, or of the defence.
5. Ability to use the English language with accuracy and precision, in clear narrative style, avoiding uncertainty, ambiguity, obscurity, and undue prolixity.
6. Observance of the established rules of pleading.

271. Complaints on Contract. — The pleader must first determine from the facts before him whether his action is to be brought or — as the old pleaders would say — “laid” *ex contractu* or *ex delicto*, and whether it is in nature an action at law or a suit in equity. If it be the case of a contract, for a breach of which the plaintiff is to sue, the contract must be alleged to enable the court and opposite party to be informed as to the facts out of which the primary right of the plaintiff arises. Then the facts constituting the breach of the contract must be alleged, so that the secondary or remedial right of the plaintiff may be apparent as a conclusion of law.

The following simple form affords an example in outline: —

FORM OF COMPLAINT FOR BREACH OF CONTRACT.

Title of Cause. }

[Commence as in form on p. 183.]

That, heretofore, to wit, on the — day of —, A. D. 18—, at [state place], the plaintiff and defendant [name him] entered into an agreement in writing subscribed by each of them [or if it be covenant, under their respective hands and seals], wherein the plaintiff, on his part, promised and agreed [or covenanted], that [here state the promises or covenants of the plaintiff].

That the said defendant, in consideration of the said promises [or covenants] on his part thereon promised [or covenanted] to and with the plaintiff that [here state the undertaking of the defendant, for breach of which the action is brought].

That the plaintiff has duly performed all the conditions, promises [and covenants], of said agreement on his part to be performed.¹

That the defendant has failed, neglected, and refused to comply with the terms of, and perform the said agreement, on his

¹ Code Ref. 277 ; ante, p. 207.

part, in this, to wit; he has failed, neglected and refused: *First*, To [here state an instance of breach]; *Second*, To [here state a second instance of breach, and so on].

To the plaintiff's damage the sum of — dollars [unless special damages must be alleged].

Wherefore the plaintiff demands judgment against the defendant [here specify the relief which plaintiff demands], and for the costs and disbursements of this action.

— — —,
Signature of Attorney.

Verification.

When the Whole Terms of Contract need not be alleged.

— If the plaintiff's case does not require that all the terms of the contract be stated, it is redundancy¹ to allege more than is material to inform the court and opposite party of the breaches in which the plaintiff claims his damages. The pleader in such case need state only the parts of the contract which are relevant. The allegation may then state the agreement or promises on the defendant's part thus: —

That the defendant, in consideration of the plaintiff's promises [or covenants] aforesaid, on his part, among other things, promised and agreed [or covenanted], [here state the promises or covenants].

*Annexing Copy.** — In drawing complaints on contract, the pleader frequently finds it convenient to attach a copy of the contract as an exhibit to his pleading. When this is done it may save him labor in framing his allegations; but he should still allege in the stating part of his complaint, the provisions of the contract which he claims have been broken,² and, generally, he must allege the breach. The complaint, when copy is attached, may be framed thus: —

¹ Steph. on Pl. sec. vi. Rule iii.

² Bliss on Code Pl. § 316.

* NOTE. — As to pleading by copy, see *ante*, p. 208.

FORM OF COMPLAINT.

Title of Cause. }

[Commence as in form on p. 183.]

That, heretofore, to wit, on the — day of —, A. D —, at —, the plaintiff and defendant entered into an agreement, in writing, subscribed by each of them [or under their respective hands and seals], of which a copy is hereto annexed, marked "Exhibit A," and made a part of this complaint [or petition].

That in and by said agreement, and upon the consideration therein expressed, to which reference is had, the defendant, among other things, promised [or covenanted], to and with the plaintiff that [*here state the promise or covenant, then allege due performance by plaintiff and breaches by defendant, and lay damages, setting forth special damages as may be necessary, and demand judgment*].

272. Complaint for Reformation of Contract. — If the action be for the reformation of a contract on the ground of mistake in failing to properly describe property or set forth the terms of the agreement, the following points must be stated in the complaint: (1) The agreement which the parties intended to make;¹ (2) The agreement as actually made;² (3) The mistake made;³ (4) The correction necessary to express the true intent of the parties.⁴

The following outline of a form may suggest the proper mode of pleading: —

¹ *McMinn v. Patton*, 92 N. C. 57; *Anderson v. Logan*, 105 N. C. 266; *James v. Cutler*, 54 Wis. 172; *Hyland v. Hyland* (Ore.), 23 Pac. R. 811.

² *Thompsonville, &c. Co. v. Osgood*, 26 Conn. 19.

³ *Burley v. Weller*, 14 W. Va. 264; *Leavitt v. Palmer*, 3 N. Y. 19.

⁴ *Stevens v. Martin*, 6 Oreg. 193.

FORM OF COMPLAINT FOR REFORMATION OF DEED.

Title of Cause. }

[Commence as in form on p. 183.]

That, heretofore, to wit, on the — day of —, A.D. 18—, at —, the plaintiff and defendant entered into an agreement whereby the plaintiff purchased, and the defendant sold and agreed to convey to the plaintiff, by good and sufficient deed of warranty with the usual full covenants, the following described premises, viz. : Lot Number One (1) in Block Number Ten (10) in the city of —, in the county of —, and State of —, of which the defendant was then the owner in fee and actually seised. That in pursuance of such agreement the plaintiff, then and there, paid to the defendant the sum of — dollars, the agreed price and full consideration for such conveyance.

That thereupon, on said day, the defendant executed a deed to the plaintiff which was mutually intended and supposed by the parties to convey the premises above described, but by mistake, and contrary to the intention of the parties, the said deed was erroneously so written as to describe the said premises as follows, to wit: Lot Number Ten (10) in Block Number One (1) in said city of —; such description being of another lot of land than the one which was the subject-matter of said agreement. That it is necessary that said deed be reformed to conform to the intent of the parties, as above stated, by describing the premises as [here give true description, as before stated].

Wherefore, the plaintiff demands judgment — (1) That said deed be reformed as aforesaid; (2) For the plaintiff's costs and disbursements of this action; (3) For such further relief as may be agreeable to equity.

— — —,
Signature of Attorney.

Verification.

273. Complaint for the Cancellation of a Deed or Contract. — The action for the setting aside or cancellation of

a deed or contract is equitable in its nature. It may be for the *actual* fraud of the other party, or, in some cases, for the constructive fraud. Let a case of actual fraud be supposed. The complaint in such an action must state according to the facts and circumstances of the case : —

1. The ownership of the plaintiff in the property or interest with which he has been induced by the fraud to part.

2. The fraudulent representations or devices which were made to induce him to enter into the contract, which must be shown to be material, and such as he was justified in placing reliance upon.

3. The execution of the contract; and that the same was induced by and made in full reliance upon the false or fraudulent representations.

4. A statement of the facts, by which the representations relied upon are shown to be false.

5. A statement of the loss or injury suffered by the plaintiff as the direct result of the fraud.

6. An appropriate demand for judgment.¹

274. Complaints in Actions for Tort. — The complaint in an action for tort must in general state the facts showing the primary right of the plaintiff, and the wrong or delict of the defendant in violation of it, and the resulting damage, and if special damages are suffered, all the facts in relation to them. Two or three examples are all that space here will permit.

Assault and Battery. — In the action for assault and battery, no facts showing primary right of the plaintiff to be secure in his person need be alleged; they are assumed to exist. The assault, beating, and special damage, if any, may be alleged thus : —

¹ Suitable forms for complaint under this head will be found in 1 Abbott's Forms, p. 585; Boone's Forms, p. 169; Bryant's Wis. Code Forms, p. 364.

FORM FOR COMPLAINT FOR ASSAULT AND BATTERY.

Title of Cause. }

[Commence as in form on p. 188.]

That, heretofore, on —, at —, the defendant (with force and arms) assaulted the plaintiff, and him then and there beat, bruised, kicked, and struck with a club, fracturing the plaintiff's skull, breaking his arm and inflicting other injuries upon him, whereby he, the plaintiff, was, for six months, lame, sick, sore, and disabled, and during that time suffered great pain of body and mind, to his damage *ten thousand dollars* (\$10,000). That by reason of the said injuries so inflicted the plaintiff was for six months prevented from attending to his business, whereby he lost his salary which otherwise he would have received in the employment which he was engaged in, viz.: that of a book-keeper, to wit, the sum of *fifteen hundred dollars* (\$1,500); and was obliged to employ and expend for the services of a physician in treating said wounds the sum of *three hundred dollars* (\$300); and for medicines and nursing the further sum of *two hundred dollars* (\$200); in all to the plaintiff's damage the sum of *twelve thousand dollars*, for which, with the costs and disbursements of this action, he demands judgment against the defendant.

— — —,
Signature of Attorney.

Verification.

Trespass quare clausum. — In trespass to lands, etc., the plaintiff should allege — (1) his right or interest in the lands trespassed upon; (2) the nature and extent of the injury committed; (3) the amount of damages, (4) closing with the demand for judgment. The following is a simple, common form: —

FORM OF COMPLAINT FOR TRESPASS.

Title of Cause. }

[Commence as in form on p. 183.]

That, heretofore, on —, at —, the defendant wrongfully (and with force and arms) broke and entered the close and premises of the plaintiff, to wit [*describe the same*], trod down the grass and herbage then and there growing, broke down the gates and fences standing thereon, and [*state any other injuries, as fact may be*]; and other wrongs and injuries then and there did, to the plaintiff's damage — dollars, for which, with the costs and disbursements of this action, the plaintiff demands judgment against the defendant.

— — —,
Signature of Attorney.

Verification.

275. Complaints for Injuries caused by Negligence. — In actions for injuries resulting from the negligence of another, the complaint must state — (1) the facts showing the situation or relation of the parties, out of which it will appear as an inference of law that the defendant owed the plaintiff a duty of care; (2) the acts or omissions which constitute the negligence. It is usually held sufficient to allege that the act was "negligently" or "carelessly" done, without setting forth the evidentiary facts from which the legal conclusion that the defendant had been guilty of negligence would arise.¹ Negligence is the ulti-

¹ The allegation that "the defendant, by its agents and servants, ran its engine in such a grossly negligent and careless manner that the same ran against and over the plaintiff's cow," held good. *Grinde v. R. R. Co.* 42 Ia. 376; and see *Schneider v. R. R. Co.* 75 Mo. 295; *McCaughey v. Davidson*, 10 Minn. 418; *Ohio, &c. R. R. Co. v. Craycraft*, 5 Ind. App. 335; *Foster v. Mo. &c. R. R. Co.* 21 S. W. 916; *Chicago, &c. R. R. Co. v. Barnes*, 2 Ind. App. 213; 28 N. E. 328; *Gulf, &c. R. R. Co. v. Wilson*, 79 Texas, 371.

mate fact to be pleaded, and the allegation of negligence is not the allegation of a mere legal conclusion, but of a fact.¹ (8) The injuries sustained must be stated, (4) the amount of the damages, and (5) demand for judgment.

It is generally held not necessary to allege in the complaint that the plaintiff was himself in the exercise of care, nor to negative contributory negligence on his part, for such absence of contributory fault is implied from the allegation that the injury was caused by the defendant's negligence.²

SECTION II.

FRAMING DEFENDANT'S PLEADINGS.

276. Defensive Pleadings.—A few practical suggestions as to the defendant's pleadings must close this treatise.

¹ *Louisville, &c. R. R. Co. v. Wolfe*, 80 Ky. 84; *Oldfield v. N. Y. &c. R. R. Co.* 14 N. Y. 310. Where negligence is charged, the addition of the words "wilfully" and "recklessly" is mere surplusage. *Moore v. Drayton*, 40 N. Y. S. R. 933.

² *Lee v. Troy, &c. Gas Light Co.* 98 N. Y. 115; *Paducah, &c. R. R. Co. v. Hoehl*, 12 Bush (Ky.), 41; *Randall v. N. W. Tel. Co.* 54 Wis. 140; *Shearman and Redfield on Negligence*, 4th ed. § 113; *Beach on Contributory Negligence*, 2d ed. § 19 n. In Indiana, Illinois, and Maine, the plaintiff's pleading must contain the averment that the plaintiff sustained the injury without fault on his part. *Mich. &c. R. R. Co. v. N. Y. R. Co.* 29 Ind. 258; *Chicago, &c. R. R. Co. v. Hazard*, 26 Ill. 373; *Buzzell v. Laconia Mfg. Co.* 48 Me. 113. In Massachusetts, although it is held that the burden is on the plaintiff to show absence of contributory fault, yet that he need not aver it in his pleading. *Fuller v. Boston, &c. R. R. Co.* 134 Mass. 491.

For excellent forms in actions for negligence, see 1 *Abbott's Forms*, pp. 442-454, 536-538; *Boone's Code Forms*, pp. 306-322; *Maxwell's Code Pleading*, pp. 257, 722-725; *Morrill's City Negligence*, pp. 241-258; 2 *Bates's Pleadings under Code*, pp. 275, 366-371; 560-564; 611-615; 677-679.

tise. The defendant's attorney on receipt of the complaint examines it carefully. His first inquiry is, Does it state a cause of action? Is it open to attack for insufficiency? Do the facts alleged constitute a cause of action, or has the plaintiff's counsel conceived a cause of action to arise where none can arise? Or, has the pleader failed to allege all the facts material and necessary to constitute a cause of action? If so, the demurrer to the complaint will be on the ground "that it appears upon the face of the complaint that the same does not state facts sufficient to constitute a cause of action."¹

If the pleading appears to be unobjectionable in respect of sufficiency, is it open to demurrer for jurisdictional defects? If not, will demurrer lie, and is it worth while to demur, for any of the special objections in the codes which are waived by pleading over?² If not demurrable, is the pleading exposed to a motion to make more definite and certain?³ If it also be found to contain the requisite degree of definiteness and certainty, then the defendant must meet it by answer.

277. The Answer.—The attorney, who prepares the defence, confers with his client, going carefully over the complaint, to ascertain what allegations in it the defendant can meet by denial. If the complaint is verified, his answer must be also verified, in many code States;⁴ and the defendant ought not to be permitted to make any denial, when it involves making oath to a falsehood. The denials which can be made must be sifted, to test whether the facts that can be denied are material and issuable. If so, how can they be denied, — positively, or on information and belief? If the defendant has no knowledge or information on the subject sufficient to form a belief, the denial

¹ *Ante*, p. 212; Code Ref. 128.

² *Ante*, p. 295; Code Ref. 299.

³ *Ib.*

⁴ Code Ref. 225.

should be to that effect.¹ Care should be taken to specifically deny each material allegation which can in good faith be controverted.² Such as are admitted should be passed over without remark.³ The pleader, in making denials, must forecast the trial to discriminate as to what may be proved under his denials,⁴ and what must be pleaded as new matter as defences by way of avoidance. The defendant is interrogated and the case examined with respect to such defences as want of consideration, payment, accord and satisfaction, discharge by bankruptcy or insolvency, release, covenant not to sue, rescission, lapse of time, or the Statute of Limitations, novation, the Statute of Frauds, usury, illegality as affected by public policy or other grounds, former recovery, another action pending, capacity to sue or be sued, etc. The defendant cannot be expected to suggest the line of defence. The lawyer must draw out the facts, and decide upon the theory on which the defence is made.

The subject must be probed to ascertain whether the defendant's case admits of a counter-claim. If the action be on contract, what set-off can be pleaded, what matter in recoupment of damages set up? If the action be in tort, what cause of action arising out of the same transaction can be counter-claimed?⁵ If the action be equitable, what causes of action does the case disclose as existing in the defendant's favor arising out of the same transaction or transactions connected with the subject of the action? Having carefully inquired into all the facts, examined all documents, and obtained a mastery of the facts of the case, the attorney fixes upon his theory of defence, whether

¹ *Ante*, p. 228 ; Code Ref. 151.

² *Ante*, p. 235 ; Code Ref. 151.

³ *Ante*, p. 238 ; Code Ref. 255.

⁴ *Ante*, p. 234.

⁵ *Ante*, p. 248 ; Code Ref. 168.

affirmative or negative, and is ready to frame his answer in accordance with the rules hereinbefore given.

SECTION III.

FOLLOWING FORMS.

278. The Use of Forms in Pleading.—Under the former system of pleading established forms were closely followed. It was the safer course generally to implicitly follow not only the forms in general structure, but in expression. Under the codes many books of forms have been published. They are doubtless of great value to the young pleader, and as many of them as are within reach should be consulted when drawing a pleading. But as most of them are framed upon a hypothetical state of facts, or are copied from pleadings drawn in some actual and peculiar case, to which the allegations of the form are properly adapted, they can but rarely be merely copied in your own case. They are useful to furnish hints and suggestions as to what should be alleged; but often it is dangerous slavishly and unthinkingly to follow them. The following suggestions may aid the pleader in the use of form-books:—

1. Note wherein your state of facts differs from that on which the form in the book is drawn, and what must be added or omitted in framing your pleading.

2. If the action is upon a statute, or any statutory requirement must be complied with, see that the form before you is framed to meet exactly such requirements. If not, then ascertain what change or alteration is necessary to meet it.

3. If you follow or consult a form made to meet the practice in another State from that in which you bring

your action, great caution should be observed. Consult the statutes, decisions, and court rules of both States, to see whether the form sufficient in one State is adequate in the other.¹

¹ A few instances are here cited to illustrate the importance of the suggestion above made: In Judge Maxwell's work on Code Pleading, in many respects a work of superior merit, are many excellent forms, commendable for brevity, directness, and general completeness. But his verifications, given on pages 562 and 563, are adapted only to those States in which the verification is required to be made only on belief (Code Ref. 228). They would not be good in the larger class of States which require a different verification (Code Ref. 226). In Morrill's City Negligence are good forms for actions against cities for injuries resulting from negligence. But he alleges in all of them that "the defendant is a body corporate," or "municipal corporation, and that, among other things, it was its duty to keep and maintain the sidewalks in said city in good, safe, and passable condition," &c. These allegations are entirely unnecessary in most States, where it is held that courts take judicial notice of the existence of cities, and that they are municipal corporations (*Smith v. Janesville*, 52 Wis. 680; *Stier v. Oskaloosa*, 41 Iowa, 353; *Dillon on Mun. Corp.*, 4th ed., § 83 (50); *O'Donold v. Evansville R. R. Co.* 14 Ind. 259). The allegations of notice given of the claim before action brought would be entirely inadequate in many cities, though doubtless sufficient in New York, where the complaint is applicable. Abbott's Forms have long been standard in the code States; but some of them have been criticised by the courts. *Pierce v. Carey*, 37 Wis. 232, 236. In several of the States the codes provide that one suing as executor, guardian, or in any other representative capacity, need only allege such capacity as a legal conclusion, without averring appointment by proceedings in some court (Iowa, § 3923). In the other States, whose codes contain no such provision, this mode of pleading would not be sufficient.

CODE REFERENCES.

An Analytical Index of the Codes of the several States and Territories which have adopted the Reformed Procedure, with reference to the sections where the provisions are found. The citations are to the sections as numbered in the following-named revisions or compilations of the Codes, or General Statutes, viz. :—

Arizona, Revised Statutes, 1888.	Nevada, Gen. Stats., 1885, Bally & Hammond's Ann.
Arkansas, Mansfield's Digest of Statutes, 1884.	New York, Bliss's Ann. Code, 3d ed. 1890.
California, Deering's Codes and Statutes, 1885.	North Carolina, Clark's Code Proc. 2d ed. 1892.
Colorado, Rice's Code of Procedure, 1890.	North Dakota, Compiled Laws, Dakota, 1887.
Connecticut, General Statutes, 1888.	Ohio, Whittaker's Ann. Code, 2d ed. 1887; Glaque, 1889.
Idaho, Revised Statutes, 1887.	Oklahoma, Stats. 1890.
Indiana, Revised Statutes, 1888, Ann. ed.	Oregon, Hill's Ann. Laws, 1887.
Iowa, McClain's Ann. Code, 1888.	South Carolina, Code Proc. in Gen. Stats., 1882.
Kansas, Gen. Stats., 1889, Ann.	South Dakota, Compiled Laws, Dakota, 1887.
Kentucky, Carroll's Code, 1888.	Utah, Comp. Laws, 1888.
Minnesota, Gen. Stats. 1891, Kelly's Ann.	Washington, Hill's Stats. and Codes, 1891.
Missouri, Rev. Stats. 1889.	Wisconsin, Rev. Stats. 1878; Sanborn & Berryman's Stats. 1889.
Montana, Comp. Stats. 1887.	Wyoming, Rev. Stats. 1887.
Nebraska, Consol. Stats., Cobby's Ann. 1891.	

The references are numbered consecutively, and the references in this volume are made by number.

		Arizona.	Arkansas.	California.	Colorado.	Connecticut.	Idaho.	Indiana.	Iowa.	Kansas.
Actions and Suits.										
1	Actions at law and suits in equity, distinction between abolished . . . . .	...	...	...	1	...	...	249	...	4087
2	But one form of civil action	4915	807	...	1	873	4020	249	...	4087
3	Such distinction not abolished in	4915	807	...	...	...	...	...	3712	...
4	Remedies divided into actions as special proceedings	4911	23	...	...	877	...	...	3709	4083
5	into actions at law and suits in equity in some States	4917	...	...	...	...	...	...	3712	...
6	Action defined: an ordinary proceeding in court of justice, by party against party to enforce a right or redress or prevent a wrong	4912	23	1	...	4020	249	3710	4081	...
7	Equitable proceedings in separate suit in . . . . .	...	...	...	...	...	...	...	3718	...
8	and transfer made, if suit wrongly brought . . . . .	...	...	...	...	...	...	...	3720	...
Parties to Actions.										
9	Party complaining, plaintiff; adverse party, defendant	4916	308	2	...	4021	250	3710	4088	...
10	All having interest in subject of action and in obtaining relief demanded, to be plaintiffs	692	4941	367	10	883	4101	262	3750	4112
11	Those united in interest to be plaintiffs or defendants	692	4941	382	12	...	4106	269	3753	4114
12	One refusing to be plaintiff to be made defendant	692	4941	382	12	883	4106	269	3753	4114
13	One or more may sue or defend for all, when plaintiff, or necessary to complete determination, to be defendants	692	4942	382	12	885	4106	269	3754	4115
14	Persons having adverse interest to plaintiff, or necessary to complete determination, to be defendants	692	4940	379	11	885	4102	268	3752	4113
15	Real party in interest to be plaintiff; suit to be in his name, except, etc.	680	4933	367	3	883	4090	251	3748	4103
16	Executor, administrator, trustee of express trust may sue without joining beneficiary . . . . .	...	4936	369	5	883	4092	252	3749	4105
17	Trustee of express trust includes one in whose name a contract is made for benefit of another . . . . .	...	4936	369	5	...	4092	252	3749	4105
18	Person expressly authorized by statute to sue, need not join beneficiary . . . . .	...	4936	369	5	...	4092	252	3749	4105
19	Assignment of thing in action not to prejudice set-offs, defences, etc., existing against assignor at time of assignment	681	...	368	4	1017	4091	276	3751	4104
20	Assignor must be joined to answer assignment, when . . . . .	...	4934	...	...	...	...	276	...	...
21	except as to commercial paper . . . . .	...	...	...	...	...	...	...	...	...
22	or, unless assigned by indorsement . . . . .	...	...	...	...	...	...	276	...	...
23	Married woman may sue and be sued as <i>feme sole</i> . . . . .	...	...	...	6	...	...	...	3767	4106
24	in actions concerning her separate estate	683	4961	370	6	984	4093	254	3767	4106
25	may sue alone for injuries to her person or character . . . . .	...	4961	...	6	...	...	5131	3767	4106
26	and, in actions against her husband, may sue alone	683	4961	370	6	...	4093	254	3767	4106
27	and for earnings, her own . . . . .	...	...	...	6	...	...	5130	3767	4106
28	and for injury or death of child, when husband is dead or has deserted	683	...	...	9	...	...	266	3767	...
29	or, when deserted, she may sue in right of husband, or defend	4953	371	265	3769	...

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...	4685	4538	...	3839	A. V. 8.1	4890	...	4908	...	A. V. 8.8	4830	2600	2360
4	4685	1989	1	4538	3023	3839	1	4890	4971	4908	...	89	4830	3126	109	2600	2360
4	...	...	...	...	...	...	...	...	...	...	1	...	...	...	...	...	...
8	...	...	...	...	...	3834	126	...	...	...	...	1	...	...	...	...	...
5	...	...	...	...	...	...	...	...	...	...	380	...	...	...	...	...	...
2	4685	1989	1	...	3023	3838	126	4811	...	...	...	2	4830	...	109	2606	...
6	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
8	...	...	...	...	...	...	...	...	...	...	380	...	...	...	...	...	...
...	4686	1989	2	4539	3024	3838	184	4830	4972	4904	2	90	4830	3127	110	2601	2361
22	...	1994	14	4578	3034	446	185	4877	5005	4816	384	188	4877	3180	143	2602	2364
24	...	1994	19	4576	3036	448	185	4879	5007	4823	385	140	4879	3184	143	2604	2366
24	...	1994	19	4576	3036	448	185	4879	5007	4823	385	140	4879	3184	143	2604	2366
25	...	...	19	4576	3036	448	185	4879	5008	4823	385	140	4879	3184	144	2604	2367
23	...	1993	16	4574	3035	447	184	4878	5006	4822	384	139	4878	3187	143	2603	2365
18	4717	1990	4	4564	3026	449	177	4870	4993	4905	103	132	4870	3169	184	2605	2382
21	4719	1991	6	4567	3028	449	179	4872	4995	4906	29	134	4872	3171	184	2607	2384
21	4719	1991	6	4567	3028	449	179	4872	4995	4906	29	134	4872	3171	184	2607	2384
21	4719	1991	6	4567	3028	449	179	4872	4995	4906	29	134	4872	3171	184	2607	2384
19	4718	...	5	4566	3027	502	177	4871	4993	4930	28	133	4871	3170	145	2606	2382
19	...	...	...	...	...	...	...	...	...	4880	...	...	...	...	...	...	...
19	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...
...	4724	1996	7	1413	...	450	...	4873	4996	4908	...	...	4873	...	...	...	2385
34	4724	1996	7	1413	3029	...	178	4873	4996	4908	30	132	4873	3172	136	2608	...
...	4724	1996	...	...	...	...	...	...	...	...	...	...	...	...	...	2345	...
34	4724	1996	3029	...	178	30	135	...	3172	136
...	4724	1996	31	2345	...
...	4723	...	13	...	3033	4920
34	4725	4319	30	135

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34	178	30	185	...	3173	...	2608	...
34	7	4568	3030	4977	187	...	3173	2386
...	186	...	3172
...
...	187
34
...	...	1998	450
35	4724	6864	1444	1418	...	469	180	2594	4896	4906	...	...	2594	...	1412	2969	...
35	4726	1997	9	4569	3031	...	...	4874	4898	...	82	186	4874	3174	142	16	2887
35	...	1997	...	4569	...	...	...	...	...	4310	...	...	...	...	...	...	2387
...	4727	2006	9	4571	3031	471	181	4874	5008	4312	82	186	4874	...	142	...	2382
37	...	5530	...	...	...	...	181	...	...	...	...	...	...	...	...	...	2387
37	...	...	...	...	...	...	...	...	5000	...	...	...	...	...	...	...	...
36	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...
35	...	...	...	...	...	...	181	...	...	4906	...	...	...	3175	...	...	...
36	...	5530	...	...	...	...	181	...	...	...	...	...	...	...	...	...	...
36	...	...	...	...	...	...	...	...	5000	...	...	...	...	...	...	...	...
36	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
36	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...	4721	...	118	4685	3031	451	275	4940	5118	4496	103	196	4940	3257	224	2612	2505
...	...	...	118	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...
...	...	...	...	...	...	...	...	...	5011	...	...	...	...	...	...	...	...
...	4720	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	2400
...	4720	...	25	4560	3619	...	...	...	...	...	...	...	...	3191	...	...	...
...
...	4723	...	...	...	3033	...	...	...	...	...	32	...	...	3177	139	...	...
...	4723	...	18	...	3033	...	...	...	...	4320	32	...	...	3178	139	...	...
...	4722	...	12	...	...	...	...	...	...	4318	35	...	...	3178	140	...	...
...
...
...
24	...	1993	19	4574	3035	447	184	4878	5006	...	384	140	4878	3181	...	2604	...
25	...	1994	19	4575	3036	447	185	4879	5007	4322	385	140	4879	3184	...	...	...
...	...	...	...	4576	3036	447	186	4879	5007	4323	386	...	...	...	...	2604	...
24	...	1994	19	4576	3036	447	186	4879	5007	4323	386	140	4879	3184	...	2604	...

		Arizona.	Arkansas.	California.	Colorado.	Connecticut.	Idaho.	Indiana.	Iowa.	Kansas.
60	one or more may defend for all, when . . .	603	4943	383	13	885	4105	269	3754	4114
61	Persons severally liable on same instrument, etc., may one, any, or all be joined . . .	667	4943	383	13	...	4106	270	...	4116
62	or, when liable as sureties on separate instruments . . .	...	4943	383	13	...	4106	...	...	...
63	or, for same debt on separate instruments jointly sued, may have same remedy as if severally . . .	...	...	...	...	...	4106	...	...	...
64	Persons jointly liable may be severally sued, in some States; and survivor of them and the personal representative of one deceased may be joined . . .	...	4944	...	...	...	...	3755	1101	...
65	whether as tenants joint or in common or co-partners . . .	...	4944	384	...	...	4107	...	...	1102
66	and when part have been released . . .	...	...	...	...	...	...	...	...	...
67	surety may sue principal to compel him to pay the debt . . .	...	...	...	21	...	...	...	...	4029
68	Interpleader. Party defendant may interplead stranger:—	...	...	...	...	...	...	...	...	...
70	in actions to recover real property . . .	...	...	...	18	...	...	273	...	...
71	in actions to recover personal property . . .	...	4947	386	18	...	4109	273	3777	4126
72	in actions upon contract . . .	...	4947	386	18	...	4109	273	3777	4126
73	or, for conversion of personal property . . .	...	...	...	...	...	...	...	...	...
74	or, may have third party joined or substituted . . .	...	...	...	...	389	...	...	3777	4126
75	or, may bring action of interpleader . . .	...	...	386	...	...	4110	...	...	...
76	or, may disclaim interest . . .	...	...	...	...	...	...	...	...	...
77	sheriff sued may interplead party to writ, etc., or have him substituted . . .	...	4949	386	...	...	...	...	3779	4121
78	in garnishment, by garnishee . . .	...	...	...	...	...	...	...	...	...
79	Intervention. Third party may intervene in action on leave:—	...	...	...	...	...	...	...	...	...
80	for recovery of real property . . .	...	4946	...	...	887	4113	...	...	4119
81	for recovery of personal property . . .	...	4946	...	...	887	4113	...	...	4119
82	general right of intervention . . .	656	...	387	23	887	4113	272	...	3889
83	without leave, in some States . . .	...	...	...	...	...	...	...	...	4123
84	in cases where property is attached or garnished . . .	...	...	...	...	...	...	...	...	4123
85	Bringing in New Parties: Court may order, when necessary to determine controversy . . .	689	4945	389	16	887	4113	273	3756	4113
86	supplemental summons and complaint then to issue . . .	...	...	...	...	...	...	...	...	...
87	brought in by amendment, on affidavit and order, when, etc. . .	689	5085	...	...	876	4109	277	...	...
88	Fictitious names: Parties may be sued by, when true name unknown, and true name inserted by amendment . . .	669	...	474	76	...	4230	397	3763	4236
89	or as unknown heir, owner, representative, etc. . .	...	...	...	...	...	...	...	3763	4236
90	Initials of first name allowable . . .	...	...	...	...	...	...	...	...	...
91	Partners may be sued in firm name when individual names unknown . . .	...	...	388	14	1008	...	...	...	...
92	and may sue in firm name . . .	...	...	...	...	...	...	...	...	...
93	associates may so sue in common name, whether partners or not (see 66) . . .	...	...	388	14	977	4112	...	...	...
94	any or all partners may be sued in some States . . .	...	...	...	...	...	...	...	3758	...
	Pleadings.									
94	Pleadings defined: Are the written statements of the parties of their respective claims and defences	5020	420	45	3851	4167

CODE REFERENCES.

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25	19	4576	3036	448	185	4879	5008	4323	385	140	4879	3184	144	2604	2397
26	4729	1906	20	4577	3037	454	186	4880	5009	4324	37	141	4880	3185	146	2609	2398
26	...	...	20	...	3037	...	...	...	...	...	...	...	...	3185	...	...	...
...	...	...	...	...	...	...	...	4880	...	...	...	...	...	...	...	2609	...
...	...	...	...	...	...	455	...	...	...	...	...	...	...	...	...	...	...
37	...	1906	...	...	...	...	187	...	...	...	...	...	...	...	...	...	...
...	...	...	21	...	3038	...	...	...	...	...	...	...	...	3186	...	...	...
...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	2604	...
237	4820	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...	4819	...	28	...	...	820	189	4887	...	4327	...	143	4887	3188	152	2610	...
30	4819	...	28	4581	3620	820	189	4887	5016	4327	40	143	4887	3188	152	2610	2408
30	4819	...	28	4581	3620	820	189	4887	5016	4327	...	143	4887	3188	152	2610	2408
...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	2610	...
...	4819	...	28	4581	3620	820	189	4887	5016	...	...	...	...	...	...	...	...
...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	153	...	...
...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	154	...	...
32	...	...	...	4582	...	...	...	...	5018	...	...	...	...	...	...	...	2406
...	...	572	...	...	...	...	...	...	...	...	...	...	...	...	...	2610	...
29	...	...	...	...	...	452	189	...	5014	4326	...	143	...	...	...	2610	2408
29	...	...	...	...	...	452	189	...	5014	4326	...	143	...	...	...	2610	2408
...	...	...	...	...	...	...	...	4886	...	...	...	...	4886	3190	156	...	...
...	4819	...	24	4584	3621	...	...	...	...	...	...	...	...	...	...	...	...
...
28	4784	2099	26	4579	3039	452	189	4885	5013	4326	41	143	4885	3192	150	2610	2402
...	...	...	...	...	...	453	...	...	...	...	...	...	...	...	...	...	...
...	4784	2099	...	...	...	...	188	...	...	4331	41	143	...	3192	...	...	...
...	4721	...	118	4685	3091	451	276	4940	6118	4436	103	196	4940	3257	224	2612	2505
691	...	2027	...	4685	...	451	...	...	...	...	...	...	...	...	...	2612	...
...	...	...	118	...	...	...	...	...	6010	...	...	...	...	...	...	...	...
...	4720	5011	2612	...
...	5011	2400
...	4720	...	25	4580	3619	8191
...
...	81	4629	5058	4374	3215	2445

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87	81	...	3068	4374	3215
88	4768	2088	82	4680	3069	518	231	4906	5067	4375	...	161	4906	3216	186	2644	2445
...	...	...	...	...	...	518	...	...	...	...	68	...	...	...	...	...	...
115	4786	...	...	4629	...	...	...	...	5068	...	...	...	...	...	...	...	2446
116	4738	2064	96	4661	3078	530	267	4921	5102	4377	80	177	4921	3224	208	2666	2459
...	4766	...	84	...	3080	478	232	4906	...	4377	65	161	4906	3118	187	2645	...
89	...	...	...	4681	...	...	...	...	5069	...	...	...	...	...	...	...	2447
...
117	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...
118	4766	2089	85	4682	3061	481	233	4907	5060	4377	65	163	4907	3119	187	2646	2447
...	...	...	...	...	...	...	...	...	5060	...	...	...	...	...	...	...	2447
...	...	...	...	4682	3061	...	233	4907	...	4377	65	...	4907	...	187	...	2447
...
127	...	2065	110	4672	3068	...	...	...	5082	...	96	...	...	3244	216	...	2469
...	...	...	...	...	...	...	233	...	...	...	...	...	...	...	...	...	...
...
83	4789	2040	...	4627	3086	484	267	4932	5019	...	...	188	4932	...	...	2647	2408
83	4789	2040	...	4627	3086	484	267	4932	5019	...	...	188	4932	...	214	2647	2408
83	4789	2040	...	4627	3086	484	267	4932	5019	...	...	188	4932	...	214	2647	2408
83	4789	2040	...	4627	...	484	267	4932	5019	...	...	188	4932	...	214	2647	2408
...
83	4789	2040	...	4627	3086	484	267	4932	5019	...	...	188	4932	...	214	2647	2408
83	4789	2040	...	4627	3086	484	267	4932	5019	...	...	188	4932	...	214	2647	2408
...	4789	2040	86	...	3086	484	...	...	...	...	...	188	...	...	...	2647	...
...	4789	2040	86	4628	3086	484	267	4932	5019	...	...	188	4932	...	214	2647	2409
...	4789	2040	86	4628	3086	484	267	4932	5000	4377	...	188	...	3220	...	...	...
113	...	...	...	...	...	488	267	...	5000	4377	...	188	4932	...	214	2647	2448
113	...	...	...	...	...	488	267	...	5000	4377	...	188	4932	...	...	...	2448
...
83	...	86	...	...	3086	484	...	...	...	4382	...	...	...	3220	...	...	...
...	4764	2041	82	4681	3080	487	233	4906	5069	4376	64	164	4906	3217	186	2648	2446
...

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[illegible]

		Arizona.	Arkansas.	California.	Colorado.	Connecticut.	Idaho.	Indiana.	Iowa.	Kansas.
	matter constituting a defence or counter-claim, in ordinary concise language without repetition . . .	...	5083	437	56	876	4183	347	3361	4177
152	and constituting a set-off . . .	...	5083	...	...	876	...	347	...	4177
153	denies specially such allegations as be controverts, admitting others . . .	...	...	...	...	874	...	...	...	...
154	counter-claim pleadable only in actions of debt . . .	736	...	...	...	...	...	...	...	...
155	formal commencement of answers required . . .	...	5083	...	...	...	...	...	3361	...
156	may allege facts occurring since suit begun . . .	736	...	...	...	...	...	...	...	...
157	may pray relief against other defendants no prayer needed in defence part . . .	...	...	...	...	...	...	...	3364	...
158	two or more defendants making same defence may join in answer . . .	...	...	...	...	...	...	354	...	...
159	Several defences or counter-claims, legal or equitable, may be united . . .	...	5083	441	59	...	4187	347	...	4177
160	but must be separately stated, and refer to cause intended to be answered . . . unless it be answer to entire complaint . . .	...	5033	442	59	...	4187	347	3363	4177
161	and numbered, in . . .	...	5083	...	...	890	...	347	...	4177
162	must be numbered, when equitable . . .	...	...	...	...	...	...	...	3366	...
163	partial defences and mitigating circumstances to be pleaded . . .	...	...	...	...	...	...	...	...	...
164	dilatory defences must be verified, in . . .	...	...	...	...	...	...	336	...	...
165	denial must be positive or on information and belief . . .	...	...	437	56	...	4183	...	...	...
166	general denial only puts in issue material and express allegations of complaint . . .	...	...	437	...	...	...	...	...	...
167	defences must be consistent, in . . .	...	...	...	...	...	...	...	...	...
168	Counter-claim (mentioned in preceding section) must be one existing in favor of a defendant and against a plaintiff, between whom several judgments might be had in the action, and arising out of the following causes of action: (1) a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action . . .	...	5084	438	57	876	4184	348	3365	4178
169	(2) in an action on contract, any other cause of action arising also on contract, express or implied, and existing at the commencement of the action . . .	...	...	438	57	...	4184	...	3365	...
170	set-off pleadable only in actions on contract, judgment, or award . . .	...	5086	...	...	...	...	348	...	4181
171	set-off in favor of principal, pleadable by surety . . .	...	...	...	...	...	...	349	3367	...
172	new parties necessary to decision or counter-claim or set-off may be brought in . . .	...	5085	...	...	890	...	...	3368	4182
173	or counter-claim stricken out . . .	...	5085	...	...	...	...	...	3368	4182
174	special rules in New York as to set-off . . .	...	...	...	...	...	...	...	...	...
175	where plaintiff is non-resident of State, any cause of action may be pleaded as a counter-claim, if it arose in State between parties . . .	...	...	...	...	876	...	...	...	...
176	set-off as counter-claims . . .	736	5086	439	4185	349	...	4186
177	counter-claim barred if not pleaded	439	4186

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96	4771	2049	89	4639	3068	500	243	4914	5070	4896	73	170	4914	3226	194	2655	2457
96	4639	...	...	...	...	5070	4896	...	...	...	...	...	...	2457
...
...
110
...	...	2063	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...	5071	...	...	...	...	...	...	...	2458
...
...	...	2051	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
113	4772	2050	91	4640	3071	507	245	4915	5071	4896	73	171	4915	3230	195	2657	2458
113	4772	2050	91	4640	3071	507	245	4915	5071	4896	73	171	4915	3230	195	2657	2458
...	507	...	...	...	...	...	...	...	...	...	...	...
113	4640	...	507	245	...	5071	4896	...	...	...	...	...	...	2458
...
...	508	...	...	...	...	...	...	...	...	...	...	...
...	513	...	...	...	4404	...	...	...	...	...	...	...
...	3068	...	...	...	...	...	...	...	...	...	...	...	...
...	3068	...	...	...	...	...	...	...	...	...	...	...	...
...	...	2051	...	...	...	...	...	...	...	...	...	...	...	...	...	...	...
...
96	4773	2050	90	4641	3069	501	244	4915	5072	4899	73	171	4915	3227	195	2656	2459
...	4773	2050	90	...	3069	501	244	4915	...	...	73	171	4915	3227	195	2656	...
96	4644	...	...	...	...	5075	4887	...	...	...	...	...	...	2462
...	4888
...	4645	5074	2461
...	4643	5074	2461
...	117
...
96	4644	...	502	5075	4887	2656	...
...	91	3228	2462

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178	not barred, but no costs allowed in subsequent suit	361	...	4179
179	unless the counter-claim is stricken out or withdrawn	4179
180	cross-demands, pleadable as counter-claim, when deemed compensated, and not affected by death or assignment . . . . .	...	...	440	58	...	4186	362	...	4183
181	disposal of action does not affect counter-claim . . . . .	...	...	561	166	...	...	363	...	4063
182	pleading set-off or counter-claim not an admission of plaintiff's cause of action . . . . .	...	...	...	...	...	...	...	...	...
183	when counter-claim equals plaintiff's claim, judgment for defendant, and for defendant when it is greater; when less, plaintiff recovers residue	738	5180	606	226	...	4462	571	4067	4508
184	when defendant is sued in representative capacity, may counter-claim demand of what kind . . . . .	...	5087	...	...	...	...	...	...	...
185	when plaintiff sues as executor or administrator, the defendant may counter-claim demands against decedent . . . . .	...	5087	...	...	...	...	...	...	...
186	counter-claim may be pleaded of cause of action maturing after suit begun . . . . .	...	...	...	...	...	...	3866	...	...
187	each counter-claim must be pleaded as such, and be so denominated; and answer shall contain demand of judgment to which defendant is entitled thereby . . . . .	...	...	...	...	...	...	...	...	...
	caption must show it to be counter-claim or set-off . . . . .	...	...	...	...	...	...	...	...	...
188	counter-claims must be separately stated and paragraphs be numbered	737	5032	441	59	...	...	347	3866	4177
	when equitable must be numbered . . . . .	...	5033	...	...	890	...	347	...	4177
189	<i>Demurrer to answer.</i> Plaintiff may demur to answer or any defence therein, when on its face it does not state sufficient facts to constitute defence or counter-claim (or set-off. <i>Ohio and Wyoming</i>)	5041	444	60	873	4198	346	3870	4185
	may demur to counter-claim —	5041	444	60	873	4198	...	3870	4185
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191	(2) for lack of jurisdiction
192	(3) for lack of legal capacity in defendant to maintain same
193	(4) for that another action is pending between same parties for same cause
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195	(6) because counter-claim is not pleadable as such
196	that several causes of counter-claim have been improperly joined	444	4194
197	that the answer is ambiguous, unintelligible, or uncertain . . . . .	...	...	444	...	...	4194	...	...	...
198	demurrer may be to whole or part of answer, and reply to other part . . . . .	...	5082	441	60	875	4193	344	3870	4185
199	when such objections do not appear on face of answer, plaintiff may reply to counter-claim . . . . .	...	5044	...	60	...	...	357	3871	...
200	if not taken by answer or demurrer, objections, except as to sufficiency, are waived	5081
201	may file demurrer with answer or reply	5062	431

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202	co-defendant may demur to answer which prays affirmative relief against him	4187
203	Reply to counter-claim, what to contain:									
	(1) general or specific denial of each material allegation controverted by plaintiff, or of any knowledge or information thereof sufficient to form a belief	671	5044	...	60	357	3871	4185
	(2) statement of new matter constituting a defence	671	5044	...	60	357	3871	4185
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204	plaintiff may set forth several defences to counter-claim	875	3873	...
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206	defences, etc., must be separately stated, and refer to counter-claims intelligibly	357	3873	...
207	and paragraphs be numbered (if equitable. <i>Iowa</i>)	357	3873	...
208	reply allowed to defensive matter in	875	3871	...
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210	reply may contain two or more avoidances of the same defence or counter-claim
211	no reply required in California, Idaho, Nevada, and Utah	422	4162
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218	<i>General provisions</i> : pleadings must be filed	359	3890	...
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222	at such time as court directs when
223	after petition, when filed, rule in Kentucky and Ohio
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226	verification must be to the effect that the pleading is true to the knowledge	785	5059	446	61	...	4190	...	3882	...

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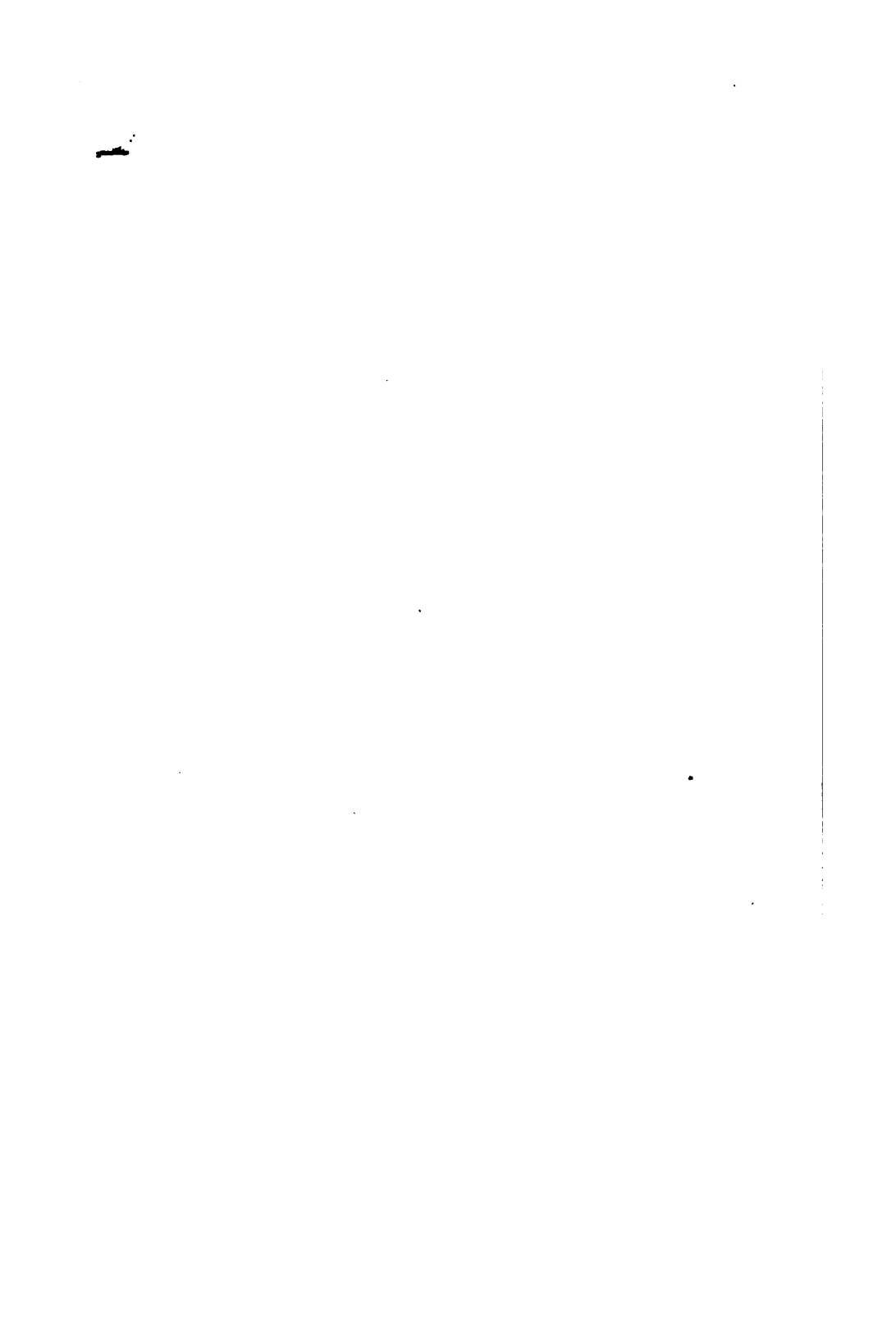
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